Supreme Court, U.S.
FILED
031305 DEC 22 2003

No.

IN THE

Supreme Court of the United States

KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GERARD J. JACKSON, ESQUIRE
Counsel of Record
LAW OFFICES OF GERARD J. JACKSON
Attorney for Petitioner
1260 Marlkress Road, Suite 2
P.O. Box 1820
Cherry Hill, NJ 08034
(856) 489-8100

Wright Appellate Services 1215
(215) 733-9870 ● (800) 507-9020 ● Fax (215) 733-9872

QUESTIONS PRESENTED

1. Whether the Court should grant Certiorari to resolve conflicts among the circuits on the existence of the doctrine of judicial estoppel, and conflicts among the circuits on standards for application of the doctrine in bankruptcy cases, where bankruptcy courts employing the doctrine utilize to dismiss meritorious causes of action of a Debtor in the absence of prejudice to creditors or other parties?

2. Whether a bankruptcy court may constitutionally dismiss a Debtor's causes of action under the doctrine of judicial estoppel in the absence of an evidentiary hearing?

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation and there is no publicly held corporation holding 10% or more of the Petitioner's stock.

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table Of Contents ii

Table Of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutory And Constitutional Provisions Involved 2

Statement 3

Reasons For Granting the Petition 6

A. Substantial Federal Question is Raised Affecting Federal Practice in General and Bankruptcy Practice in Particular 6

B. Procedural Due Process Requirements Should be Met Before Doctrine is Applied 13

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases:

Astor v. Chauffeured Limousine Company, 910 F.2nd 1540 (7th Cir., 1990).....10

Celotex Corp. v. Cotrett, 477 U.S. 317 (1986).....8, 9

Everett v. Judson, 228 U.S. 479 (1913).....8

Faigin v. Kelly, 184 F.3rd 67, 82 (1st Cir., 1999).....10

Harker v. Troutman, 253 B.R. 1, 7 (B.A.P. 6th Cir., 2000).....11

Hickman v. Taylor, 329 U.S. 495 (1947).....8

In re: Cassidy, 892 F.2nd 637, 642 (7th Cir., 1990).....10

Jeffrey v. Desmond, 70 F.3rd 183 (1st Cir., 1995).....11

Konstandtinidis v. Chen, 626 F.2nd 933, 939 (D.C. Cir., 1980).....10

New Hampshire v. Maine, 532 U.S. 742 (2001).....7, 13

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552 (1990).....9

Pittston Company v. United States, 199 F.3rd 694, 701 (4th Cir. 1999).....10

Rice v. Sioux City Memorial Park Cemetery Inc, 349 U.S. 70, 74 (1955).....14

Rossetto v. Plumbers and Steamfitters Local 343, 94 F.3rd 597, 604 (9th Cir. 1996) 10

Royal Insurance Company of America v. Quinn-L Capital Corporation, 3 F.3rd 877, 885 n.6 (5th Cir. 1993)..... 10

Ryan Operations G.P. v. Santiam Mid-West Lumber Company, 81 F.3rd 355, 360 (3rd Cir. 1996)..... 10, 11

Sturm v. Boker, 150 U.S. 312, 336 (1893) 10

United States v. $8850, 461 U.S. 555, 562 n. 12 (1983)... 14

United States v. 49.01 Acres of Land, 80 F.2nd 387, 390 (10th Cir. 1986) 9

Wight v. Bankamerica Corp., 219 F.3rd 79, 90 (2nd Cir. 2000) 10

Statutes:

Section 362(h) of the Bankruptcy Code 2, 7

Constitutional Provisions:

U.S. Const. Amendment V 2

Miscellaneous:

Brown, Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Non-Bankruptcy Forums, 75 Am. Bankr. L.J. 197 (Spring 2001) 6, 12

Comment: Judicial Estoppel – *Beating Shields into Swords and Back Again*, 139 U.Pa.L. Rev. 1711 (1991).....12

Solum: Caution! Estoppel: Cleveland v. Policy Management Systems Corporation, 32 Loy.L.A.L.Rev 461 (1999).....12

APPENDIX

	Page
Appendix A – Order Sur Petition for Rehearing En Banc, dated September 22, 2003	1a
Appendix B – Opinion of the Court, filed July 28, 2003	3a
Appendix C – Order, dated June 21, 2003	26a
Appendix D – Memorandum Opinion, filed June 21, 2001	27a
Appendix E – Memorandum Opinion, filed November 24, 2000	45a
Appendix F – Memorandum and Order, dated March 1999	78a
Appendix G – Opinion of the Court, dated April 23, 1998	91a
Appendix H – First Amended Complaint – Civil Action	107a

Krystal Cadillac-Oldsmobile-GMC Truck, Inc. ("Krystal Cadillac") petitions the Court to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Third Circuit Court of Appeals as to which review is sought is reported at 337 F.3d 314 (3rd Cir., 2003). (App. *infra*, 3a). The Opinions and Orders of the Bankruptcy Court for the Middle District of Pennsylvania (App. 46a) and of the United States District Court for The Middle District of Pennsylvania (App., *infra*., 27) are unreported. The Opinion of United States District Court for the Eastern District of Pennsylvania transferring the case to the Middle District of Pennsylvania is reported at 232 B.R. 622 (E.D. Pa., 1999). (App. 78a) The Opinion of the Third Circuit Court of Appeals holding that General Motors had engaged in a violation of the automatic stay provisions of the Bankruptcy Code is reported at 142 F.3rd 631 (3rd Cir.,1998).

JURISDICTION

The Third Circuit Court of Appeals entered its judgment docketed on July 28, 2003 (App., *infra*., 3a), and its Order denying petition for rehearing September 22, 2003. (App. 1a). Jurisdiction of the Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 362(h) of the Bankruptcy Code, 11 U.S.C. 362(h), providing, in relevant part, that:

> (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

U.S. Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The Petitioner is Krystal Cadillac Oldsmobile GMC Truck, Inc. ("Krystal Cadillac") a General Motors retail franchisee which, since 1987, has operated an automobile/truck dealership in Gettysburg,. Pennsylvania. In a civil action filed in September, 1998, Petitioner set forth various cause of action against GM and GMAC, among them a claim for damages under 11 U.S.C. 362(h). (App. 107a; 125a). The Bankruptcy Court for the Middle District of Pennsylvania dismissed this complaint in its entirety under principles of judicial estoppel. (App. 46a). This dismissal was affirmed in the United States District Court for the Middle District of Pennsylvania and in the Third Circuit Court of Appeals. Krystal seeks certiorari from the Third Circuit's ruling.

By way of background to the instant litigation, Krystal, under its franchise agreement with GM, had, among other responsibilities, the duty to maintain a line of credit from a financial institution so as to finance the purchase of vehicles. In October, 1991, Respondent, General Motors Acceptance Corporation ("GMAC") the financial arm of GM, unilaterally terminated the line of credit upon which Krystal had been relying to purchase new vehicle inventory. Krystal attempted to obtain substitute financing. Upon its failure to do so, it received notice from GM that on May 10, 1993 the franchise would be terminated in sixty (60) days, or on July 13, 1993. On August 11, 1993, Krystal filed an appeal with the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons ("Vehicle Board") requesting a hearing on

the merits of the attempted termination. The Vehicle Board held a hearing on August 2, 1994. Prior to issuance of a decision by the Vehicle Board, Krystal filed a voluntary petition under Chapter 11 of the Bankruptcy Code, on September 8, 1994, in the United States Bankruptcy Court for the Middle District of Pennsylvania. While the bankruptcy case was pending, the Chapter 11 Trustee filed a motion to sell Krystal's GM franchise free and clear of liens and encumbrances. General Motors filed an objection to the Trustee's motion to sell, contending that the Dealership Franchise Agreement had been lawfully terminated and was neither sellable nor assignable. On June 15, 1995, the Bankruptcy Court conducted a hearing on the Trustee's proposed motion to sell the franchise and denied that motion.. Krystal filed an Amended Chapter 11 Plan Reorganization on October 24, 1995, which, *inter alia*, provided for the sale of the GM dealership franchise agreement to fund some of the payments due Krystal's creditors. Under this Plan, Krystal proposed that secured and priority creditors were to be paid in full, and unsecured creditors were to receive 75% of their claims after Plan confirmation, and the balance upon sale of the dealership franchise. GM lodged objections to this Plan, asserting that the dealership franchise agreement no longer existed.

On July 26, 1996, the Bankruptcy Court again entered an order denying the Trustee's motion to sell the franchise. (App. 97a) Thereafter, both the Chapter 11 Trustee and Krystal appealed the Bankruptcy Court's decision to the Third Circuit Court of Appeals, which, on April 23, 1998, reversed that judgment and held that the dealership franchise

agreement was an asset of the bankruptcy estate. (App. 92a; 102a). The Third Circuit also held that the Trustee was entitled to cure any defaults and to assume and assign the dealership for the benefit of Krystal's creditors. In this opinion, the Third Circuit also held that GM had violated the automatic stay provisions of Section 362 of the Bankruptcy Code. (App. 105a).

On September 25, 1998, Krystal filed its complaint against GM and GMAC in the United States District Court for the Eastern District of Pennsylvania, seeking monetary damages against those Defendants for violations of the automatic stay provisions of the Bankruptcy Code, and asserting other causes of action. (App. 107a). This Complaint was the subject of two motions by the Defendants: a motion under FRCP 12(b)(6); and a motion seeking transfer of the case from the Eastern District of Pennsylvania to the Middle District of Pennsylvania on *forum non conveniens* grounds. The Eastern District granted the motion to transfer. Upon its receipt of the case, the District Court for the Middle District of Pennsylvania referred the complaint to the Bankruptcy Court for the Middle District of Pennsylvania.

In an Opinion and Order filed November 24, 2000, the Bankruptcy Court dismissed the Complaint, with no hearing, based on principles of judicial estoppel. (App. 46a). The Bankruptcy Court raise this issue *sua sponte,* requesting briefs from the parties. Petitioner filed a timely appeal from that Order to the United States District Court for the Middle District of Pennsylvania. The Middle District affirmed the

decision of the Bankruptcy Court in an unreported opinion filed June 21, 2001. (App. 27a). Krystal appealed from that decision to the Third Circuit Court of Appeals, on July 19, 2001. The Court of Appeals affirmed the District Court and the Bankruptcy Court. (App. 3a). Petitioner filed a timely motion for reconsideration/en banc, which the Court of Appeals denied on September 22, 2003. (Appendix 1a).This petition follows.

REASONS FOR GRANTING THE PETITION

A. Substantial Federal Question is Raised Affecting Federal Practice in General and Bankruptcy Practice in Particular

The Bankruptcy Court, in raising a judicial estoppel issue *sua sponte* and deciding it adversely to Petitioner, denied the Petitioner significant and substantial property rights as to causes of action arising both before and after the filing of its Chapter 11 petition. This case is but one example of a national trend in the bankruptcy courts towards the aggressive use of a controversial common law doctrine which some Circuits do not even recognize.

Judicial estoppel is the doctrine which holds that a party is estopped from taking inconsistent positions in different judicial proceedings (or within the same proceedings). Federal courts are applying the doctrine with increasing regularity in the bankruptcy setting. *See Brown, Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Non-Bankruptcy Forums*, 75 Am. Bankr. L.J. 197 (Spring 2001) and authorities cited therein. Typically, where a debtor's

schedules omit reference to a pending or potential cause of action, the failure to list such assets will often result in dismissal of the cause of action, either in the bankruptcy forum, or in a non-bankruptcy forum, under principles of judicial estoppel. Recently, in *New Hampshire v. Maine*, 532 U.S. 742 (2001) the Court discussed the doctrine of judicial estoppel in the context of an original jurisdiction dispute between two states. The Court adopted certain criteria in that case for application of the doctrine, as follows: (1) the taking by a party of "clearly inconsistent" positions in judicial proceedings; (2) the party's persuasion of the court in the first proceeding to accept or "adopt" that party's position such that the subsequent inconsistent position, if adopted, would appear to result in the court's having been misled; and (3) the obtaining of an unfair advantage by the party who took the inconsistent positions. In *New Hampshire v. Maine* the Court acknowledged that other factors may be considered in the application of the doctrine, dependent upon the facts of a particular case.

When applied as a sanction, the doctrine results in the severest of penalties, dismissal with prejudice of a litigant's cause(s) of action. The dismissal occurred in this case where the tort liability of GM was evident, as a matter of fact and law, the Third Circuit having earlier recognized and held that GM's conduct had constituted a violation of the automatic stay provisions of the Bankruptcy Code. (App. 105a). The Bankruptcy Court herein dismissed a multi-count complaint which included a cause of action under Section 362(h) of the Bankruptcy Code which was not property of the Chapter 11 Debtor's estate (that claim having accrued only after the fil-

ing of the bankruptcy petition). Petitioner's §362(h) claim, given its accrual post-petition, was without question not part of the bankrupt's estate and therefore unavailable for distribution to creditors. *Everett v. Judson*, 228 U.S. 479 (1913). Thus, the dismissal of Petitioner's Section 362(h) claim could not have vindicated the legitimate interest of any creditor as it was not an asset whose eventual proceeds would have been available for distribution to creditors. Application of the judicial estoppel doctrine herein also had the result of rewarding a party (GM) which the Third Circuit crisply held had engaged in a violation of the automatic stay. The vital federal concern of ensuring the sanctity of the automatic stay was, in this case, undermined by use of the doctrine to dismiss the Section 362(h) claim.

The unrestrained use by the nation's federal court system of an ill-defined common law doctrine, without uniform national standards, is a recurring issue worthy of consideration by the Court. Given the frequency with which the doctrine is being employed in the federal system, and its serious effects, the questions now urged for certiorari review have importance beyond the rights and liabilities of the parties to the instant controversy.

The Court has prime responsibility for the federal judiciary, and has repeatedly accepted cases for certiorari to construe, for example, the Federal Rules of Civil Procedure. *See Hickman v. Taylor,* 329 U.S. 495 (1947). It should accept certiorari in this case. In *Celotex Corp. v. Cotrett,* 477 U.S.317 (1986), the Court reviewed a trilogy of cases in order to clarify and refine the proper standards for summary

judgment under FRCP 56(c). Therein, the Court granted certiorari to resolve divergent views among the federal circuits concerning the proper standard for grant of a motion for summary judgment under FRCP 56(c).

There is a need for a uniform federal policy on administration of bankruptcy cases. The Court has granted certiorari in significant matters arising under the Bankruptcy Code on prior occasions. *See, e.g., Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). The Court has also accepted cases for certiorari to clarify divisions of opinion among the circuits concerning bankruptcy issues. *Celotex Corporation v. Edwards,* 514 U.S. 300 (1995).

As to the alleged non-disclosure in bankruptcy schedules of the 362(h) claim, the integrity of the bankrupt's estate and rights of creditors were not affected. The Section 362(h) claim was not property of the debtor's estate and was therefore not available to creditors. As to the non-362(h) counts of the dismissed complaint, use of the doctrine to dismiss was a dubious means of protecting creditors, where the Petitioner's plan called for payment of 100% of all obligations to both secured and non-secured creditors. (App. 21a).

There is no uniform expression of the judicial estoppel doctrine in the federal court system. The degree of specificity of elements required for application of the doctrine varies from circuit to circuit. Standards for its use also vary from circuit to circuit. The spectrum runs from a frank rejection of the doctrine, *see United States v. 49.01 Acres of Land*, 80 F. 2nd 387, 390 (10th Cir., 1986), to acceptance, with varying

standards for application. For example, the First and Seventh Circuits recognize the doctrine and have held that a prior legal *or* factual position may be a basis for its invocation. *Faigin v. Kelly,* 184 F. 3rd 67, 82 (1st Cir., 1999); *In re: Cassidy,* 892 F. 2nd 637, 642 (7th Cir., 1990). By contrast, the Fifth Circuit holds that a legal position alone will not justify a judicial estoppel. *Royal Insurance Company of America v. Quinn-L Capital Corporation*, 3 F. 3rd 877, 885 n. 6 (5th Cir., 1993) (citing *Sturm v. Boker*, 150 U.S. 312, 336 (1893)). The Second Circuit requires that the prior inconsistent position be factual. *Wight v. Bankamerica Corp.,* 219 F. 3rd 79, 90 (2nd Cir., 2000). The Fourth Circuit holds to a similar effect. *Pittston Company v. United States*, 199 F. 3rd 694, 701 (4th Cir. 1999). In *Astor v. Chauffeured Limousine Company,* 910 F. 2nd 1540 (7th Cir., 1990) the court held that is must be shown that the errant party has gained something from the initial representation.. The Third Circuit, however, has held that the showing a benefit from the inconsistent position is not required. *Ryan Operations G. P. v. Santiam Mid-West Lumber Company*, 81 F. 3rd 355, 360 (3rd Cir.,1996).

The Circuits are further divided, for example, on the question of whether settlement in the prior suit will constitute "actual adoption" by a court or administrative tribunal with respect to the first position taken. *See, e.g., Rossetto v. Plumbers and Steamfitters Local 343*, 94 F. 3rd 597, 604 (9th Cir., 1996) and *Konstantinidis v. Chen*, 626 F. 2nd 933, 939 (D.C. Cir., 1980).

In the First Circuit there is no required showing of bad intent by the party who is ultimately estopped. *See Jeffrey v.*

Desmond, 70 F. 3rd 183 (1st Cir., 1995). By contrast, the Third Circuit has held that the doctrine of judicial estoppel "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims" *Ryan Operations G. P., supra.*, 81 F. 3rd at 365. In still another Circuit, there is the position that mere failure by a debtor to disclose an asset in its schedules does not constitute a "position" that the debtor has taken in the bankruptcy court. *Harker v. Troutman,* 253 B.R. 1, 7 (B.A.P. 6th Cir., 2000). Bankruptcy courts have applied the doctrine to dismiss debtors' causes of action in bankruptcy that were not disclosed in schedules, without regard to whether the omission in the bankruptcy case was material.

Given this state of differing and often contradictory views among the Circuits, it is urged that certiorari is appropriate to resolve this question of importance to the federal court system, and, in particular, the bankruptcy system. The issues presented are beyond the mere academic.

Given the grave results of the doctrine when it is applied, it is urged that clearly defined elements and standards are necessary in order to make it coherent and nationally uniform throughout the federal system.

Notably, in the case at bar, the Bankruptcy Court precluded a 362(h) claim where, at the time of the original filing of the Schedules, the Bankruptcy Court *itself* had negated any semblance of a claim for damages for violation of the automatic stay. It was only in 1998, when Krystal Cadillac's position was vindicated in the Third Circuit, that Krystal could have maintained a viable cause of action under Section

362(h), as it had been theretofore law of the case that GM's efforts to prevent sale of the franchise in the bankruptcy litigation were in fact proper, and not a violation of the automatic stay.

Commentators have noted problematic aspects of the doctrine. *See, e.g.,* Comment: Judicial Estoppel - *Beating Shields into Swords and Back Again,* 139 U.Pa.L. Rev. 1711 (1991). *See also, Solum: Caution! Estoppel: Cleveland v. Policy Management Systems Corporation,* 32 Loy. L.A.L.Rev. 461 (1999). Inconsistent and sometimes aggressive application of the doctrine throughout the federal circuits is noted in *Brown, Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Non-Bankruptcy Forums*, 75 Am. Bankr. L.J. 197 (Spring 2001).[1]

The doctrine of judicial estoppel has far-reaching effects, with serious potential for misuse, especially in the bankruptcy setting. In the case at bar the Third Circuit applied the doctrine aggressively, even to the point of affirming the dismissal by the Bankruptcy Court of a cause of action which was not part of the debtor's estate, as it only accrued post-petition. When applied, the doctrine results in the extreme sanction of dismissal. Often, such dismissals are at the expense of a debtor whose failure to list the asset in its schedules is merely inadvertent. The dismissal will typically

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[1] It is worthy of note that lead author of this comprehensive article which sets forth the difficulties of the doctrine and its inconsistent application throughout the federal system is a Bankruptcy Judge.

derail an otherwise meritorious claim, and will often generate a windfall for a tortfeasor. This is what occurred in the case at bar.

The Court has only visited the doctrine of judicial estoppel on a few occasions. Most recently, it discussed the doctrine at length in *New Hampshire v.Maine*, 532 U.S. 742 (2001). While this opinion by the Court enlightened the circuits by its explicit recognition of the doctrine, given the limitations of the case (dealing as it did with the unusual setting of a dispute between States invoking the Court's original jurisdiction), acceptance of certiorari herein will serve the important purpose of establishing standards for use and boundaries of the doctrine in the bankruptcy setting. Simply put, the federal courts in general and the bankruptcy courts in particular are in need of guidance from the Court as to standards for use and application of the doctrine. This need is acute, given the divergence of approaches to the doctrine among the circuits.

B. Procedural Due Process Requirements Should be Met Before Doctrine is Applied

In this case, the doctrine was applied with no evidentiary hearing in the Bankruptcy Court. Given that the outcome herein caused deprivation of a fundamental property right, this was not in accordance with procedural Fifth Amendment Due Process principles. The requirements of procedural due process apply with respect to deprivations of property, clearly encompassed by the Fifth Amendment to the U.S. Constitution. When protected interests are implicated, the right to some kind of hearing is paramount. Parties must

receive notice and an opportunity to be heard before the Government deprives them of property. *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983). Again, grant of certiorai is urged as the question presented is beyond the mere academic, and involves an important constitutional right. *Cf. Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BY:_____

GERARD J. JACKSON, ESQUIRE
Counsel of Record
1260 Marlkress Road, Suite 2
P.O. Box 1820
Cherry Hill, NJ 08034-0109
(856) 489-8100
Counsel for Petitioner

APPENDIX A – ORDER SUR PETITION FOR REHEARING EN BANC, DATED SEPTEMBER 22, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2952

IN RE: KRYSTAL CADILLAC-
OLDSMOBILE –GMCTRUCK, INC.
v.
GENERAL MOTOR CORPORATION;
GENERAL MOTORS ACCEPTANCE
CORPORATION

Krystal Cadillac-Oldsmobile-
GMC Truck Inc.,
Appellant

SUR PETITION FOR REHEARING EN BANC

BEFORE:SCIRICA, SLOVITER, NYGARRD, ALITO,
ROTH, MCKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, CHERTOFF *Circuit Judges*

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

IT IS SO ORDERED

By the Court,

_____

Hon. Theodore A. McKee
Circuit Judge

APPENDIX B– OPINION OF THE COURT FILED JULY 28, 2003

PRECEDENTIAL

Filed July 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2952

Krystal Cadillac-Oldsmobile GMC Truck, Inc.,
Appellants

v.

General Motors Corporation and General Motors Acceptance Corporation,

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On Appeal from the United States District Court
For the Middle District of Pennsylvania
District Judge: Hon. Sylvia H. Rambo

Argued: September 19, 2002
Before: SCIRICA * *Chief Judge*, ALITO, and
MCKEE, *Circuit Judges*

(Opinion filed: July 28, 2003)

GERARD J. JACKSON, ESQ.
(Argued)
1260 Marlkress Road, Suite 2
P.O. Box 1820
Cherry Hill, NJ 08034-0109
Attorney for Appellant

JAMES A. MOLLICA, ESQ. (Argued)
TIMOTHY MURRAY, ESQ.
450 Trimont Plaza
1305 Grandview Avenue
Pittsburgh, PA 15211-1205
Attorneys for Appellees

OPINION OF THE COURT

McKEE, *Circuit Judge*.

Krystal Cadillac-Oldsmobile-GMC Truck, Inc., a Chapter 11 debtor, appeals an order of the District Court affirming the Bankruptcy Court's dismissal of the suit Krystal filed against GMC for breach of contract and related causes of action. The District Court concluded that the Bankruptcy Court correctly relied upon the doctrine of judicial estoppel in dismissing all of the counts in Krystal's complaint. We agree that judicial estoppel was properly invoked by the

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* Judge Scirica began his term as Chief Judge on May 4, 2003.

Bankruptcy Court, and we will affirm the order of the District Court.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Termination of the Franchise Agreement

Since 1987, Krystal Cadillac has operated a General Motors automobile dealership in Gettysburg, Pennsylvania pursuant to a franchise agreement with GM. Under the terms of agreement, Krystal maintained a line of credit from a financial institution in order to finance Krystal's purchase of new GM vehicles.[2] In October 1991, Krystal lost its "floor plan" financing with General Motors Acceptance Corporation, GM's financial arm, and Krystal was not able to secure any other financing. This constituted a default under the franchise agreement. Consequently, on July 13, 1993, GM notified Krystal that GM intended to terminate the dealer

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[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 548(a). We have appellate jurisdiction pursuant to 28 U.S.C. § § 158(d) and 1291.

In reviewing the decision of the District Court, we apply the same standard of review the District Court employed in reviewing the Bankruptcy Court's decision. We review factual findings for clear error, and we exercise plenary review over any legal conclusions. *See In Re Woskob*, 305 F.3d 177 (3d Cir. 2002).

[2] Article 6.4.1 of the Dealer Agreement between Krystal and GM requires Krystal "to have a reasonable quantity and variety of . . . Motor Vehicles in inventory." Article 10 requires Krystal " to maintain a separate line of credit . . . to finance its purchase of new vehicles."

agreements. Following an extension, that termination was to become effective on August 12, 1993. However, on August 11, 1993, the day before the termination became effective, Krystal initiated a proceeding before the Pennsylvania Board of Vehicle Manufacturers, Dealers, and Salespersons ("Vehicle Board") challenging the legality of the franchise termination.[3] The Vehicle Board held a hearing on Krystal's

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[3] The Board of Vehicles Act of December 22, 1983, P.L. 306, as *amended*, 63 P.S. § 818.9(c) provides, in pertinent part, the following:

> Canceling of franchises.-It shall be a violation of this act for any manufacture, distributor, officer, agent or any representative whatsoever of a vehicle manufacturer to unfairly, without due regard to the equities of said dealer and without just provocation, cancel the franchise of any vehicle dealer . . . At any time before the effective date such termination . . . the dealer or distributor may appeal to the board for a hearing on the merits ,and following due notice to all parties concerned, such a hearing shall be promptly held. No such termination . . . . shall become effective until final determination of the issue by the board. In the event of a dealer . . . appeal of the termination . . . of its franchise, the burden of proof shall be on the manufacturer or importer to show that such termination . . . was based on the dealer's failure to comply substantially with the reasonable and material requirements of the franchise. The manufacturer shall not meets its burden of proof to terminate . . . the franchise if the acts of the manufacturer,

petition on August 8, 1994, and entered an Order and Adjudication upholding GM's termination of the dealership agreements on September 27, 1994.[4] Krystal thereafter appealed that Order to the Commonwealth Court of Pennsylvania, but that court affirmed the ruling of the Vehicle Board on November 6, 1995.

B. The Proceeding in the Bankruptcy Court *(Krystal I).*

On September 8, 1994. (approximately three weeks before the Vehicle Board rendered its decision), Krystal filed for Chapter 11 protection. Thereafter, on June 15, 1995. Krystal filed a Plan of Reorganization in which it provided for the sales of its GM franchise in order to raise funds to pay creditors. GM objected to the plan arguing that it had properly terminated the franchise agreement with Krystal pursuant to the terms of that agreement. The appropriate state agency had upheld the termination, and the Commonwealth ourt had affirmed the agency's determination that the termination was proper. Thus, according to GM, the franchise was not an asset of the estate available for sale in the bankruptcy pro-

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> in whole or in significant part, caused the dealer to be unable to comply substantially with the reasonable and material requirements of the franchise.

[4] The Board found that GM's termination of Krystal's franchise was proper because Krystal had failed to comply with the reasonable and material franchise requirements for obtaining a line of credit, and had failed to maintain an adequate inventory of new vehicles.

ceedings. On October 24, 1995, Krystal filed an Amended Reorganization Plan and Amended Disclosure Statement. Article V of the Disclosure stated:

> Debtor also holds an Automobile Franchise Agreement with General Motors Corporation. However the status of this franchise is not in litigation. General Motors terminated the franchise prior to the commencement of the case and the matter was in litigation at the time the Chapter 11 petition was filed. General Motors nevertheless proceeded with termination and the matter is now on appeal in the Commonwealth Court. Debtor takes the position, which is vigorously contested by General Motors, that this franchise agreement remains an asset of the case.

GM responded by filing a separate objection to the plan and disclosure statement based upon its continuing contention that Krystal's franchise was not an asset of the estate and could not be sold by Krystal or the Trustee to satisfy Krystal's creditors.

The Bankruptcy Court affirmed GM's objections and ruled that the franchise had been validly terminated by GM. Accordingly, the court held that the franchise could not be sold as part of the bankrupt's estate. The District Court subsequently affirmed that ruling, and Krystal than appealed to us. We reversed. We held that inasmuch as Krystal had filed for bankruptcy before GM terminated the franchise agreement, GM's termination of that agreement was a violation of the automatic stay imposed under § 362 of the Code. *See, In*

Re Krystal Cadillac Oldsmobile GMC Truck, Inc. , 142 F.3d 361 (3d Cir. 1998) ("Krystal I").[5]

C. Krystal II: The Instant Dispute

On September 25, 1998, Krystal filed the instant action in the District Court for the Eastern District of Pennsylvania against GM. Krystal's claims for relief arise from GM's violation of the automatic stay by terminating Krystal's franchise agreement after Krystal filed for Chapter 11 protection. More specifically, Krystal seeks damages on each of the following seven grounds: (1) violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(h); (2) breach of contract; (3) violations of Federal Dealers Day in Court Act, 15 U.S.C. § 1221 and of the Pennsylvania Board of Vehicles Act, 63 P.S. § 818 et seq.; (4) conspiracy; (5) conversion; (6) tortiuous interference with contractual relations; and (7) violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

The Eastern District Court referred Krystal's suit to the District Court for the Middle District of Pennsylvania because the claims were interwoven with the bankruptcy action

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[5] We concluded that, under Pennsylvania law, termination of a franchise does not become effective "until final determination of the issue by the board." *Krystal Cadillac,* 142 F.3d at 636 (3rd Cir. 1998). Since the Vehicle Board did not issue its final determination on Krystal's appeal of GM's purported termination until after Krystal filed for bankruptcy, the subsequent termination of the franchise was a violation of the automatic stay and therefore invalid. *Id.*

then pending the Bankruptcy Court for the Middle District Although GM filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court never ruled on that motion. Rather, the court *sua sponte* dismissed Krystal's complaint in its entirety under the doctrine of judicial estoppel. In doing so, the court noted that Krystal's complaint could also be dismissed for (1) failure to state a claim upon which relief could be granted, and (2) expiration of the applicable statutes of limitations. As noted above, the District Court affirmed the Bankruptcy Court's application of the doctrine of judicial estoppel, and this appeal followed. [6]

II. DISCUSSION

Krystal makes several arguments as to why judicial estoppel was improperly applied here. However, before we address any of those specific arguments, it will be helpful to first provide a brief overview of that doctrine as a framework for our analysis.

A. Judicial Estoppel In General

We first articulated the doctrine of judicial estoppel in *Scarano v. Central R. Co. of N.J.*, 203 F.2d 510 (3rd Cir. 1953). There, we stated that "a plaintiff, who has obtained relief from an adversary by asserting and offering proof to support one position, may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his ear-

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[6] Krystal's bankruptcy case was still pending in Bankruptcy Court when this case was argued.

lier contention." *Id.* at 513. In doing so, we recognized the intrinsic ability of courts to dismiss an offending litigant's complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from "playing fast and loose with the courts" *Id.*[7] (internal quotation marks omitted).

Since *Scarano,* we have consistently stated that the doctrine should only be applied to avoid a miscarriage of justice. *See Montrose Medical Group Participating Savings Plan v. Bugler,* 243 F.3d 773 (3rd Cir. 2001). Thus, in *Ryan Operation G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3rd Cir. 1996), we stated: "[t]he basic principle of judicial estoppel. . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek and inconsistent advantage by pursuing an incompatible theory." *Id.*

Judicial estoppel is therefore not intended to eliminate all inconsistencies no matter how slight or inadvertent they may be. *See, In re Chambers Development Co., Inc.*, 148 F.3d 214 (3rd Cir. 1998). In *Montrose Medical Group*, we identified certain criteria for determining when seemingly inconsistent litigation stances justify application of the doctrine. We concluded:

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[7] *See also, Delgrosso v. Spang and Co.*, 903 F.2d. 234 (3rd Cir. 1990) (starting that unlike the concept of equitable estoppel, which focuses on relationship between parties, judicial estoppel focuses on relationship between litigant and judicial system, and seeks to preserve integrity of system).

> First, the party to be estopped must have taken two positions that are *irreconcilably inconsistent.* Second judicial estopple is unwarranted unless the party *changed his or her position "in bad faith*- i.e., with intent to play fast and loose with the court." Finally, a district court may not employ judicial estoppel unless it is "tailored to address the harm identified" and *no lesser sanction would adequately remedy the damage* done by the litigant's misconduct.

243 F.3d at 779-80 (emphasis added) (citations omitted). We also noted that equity requires that the presiding court give the party to be estopped a meaningful opportunity to provide an explanation changed position . *Id* at 780.

With these principles in mind, we turn to Krystal's alleged inconsistent representations here.

B. Krystal Inconsistent Representations

As noted above, each of the claims in Kyrstal's seven count complaint is related to, and arises from, GM's termination of Krystal's Franchise Agreement. The primary claim is the violation of the automatic stay contained in count I. All of Krystal's other claims against GM rest upon that violation. [8]

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[8] For reasons best known to GM and/or its attorneys, GM spends considerable time and energy in this appeal arguing that its violation of the automatic stay was not willful. *See* Appellee's Br. At 17-21. For example, GM argues " In [*Krystal I*] , this Court held

When Krystal filed its Amend Disclosure Statement, it knew about each of the claims it has now included in this action. However, as quoted above, the Amended Reorganization Plan and Amended Disclosure Statement merely referenced Krystal's position that the dealer agreements were part of the bankruptcy estate and the ongoing state proceedings wherein Krystal was attempting to undo GM's termination of them.

The Bankruptcy Court found that Krystal limited the reference to the instant claim in order to conceal the claims from creditors in the hope of retaining any recovery for itself. While Krystal concedes that the schedules and statements it initially filed with the Bankruptcy Court on October

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that GM had violated the automatic stay , but did *not* reach the issue of whether GM's conduct also constituted a *willful* violation under § 362(h)." Br. at 17-8 (emphasis in original). GM obviously knows that we have already ruled that its attempt to terminate the franchise agreement was a violation of the automatic stay. We can not, and will not, revisit that issue here.

Moreover, although § 362(h) requires a "willful" violation as a condition precedent to recovering damages, we have noted that this does not mean that the creditor must intend to violate the stay. "It is a willful violation of the automatic stay when a creditor violates the stay with knowledge that the bankruptcy petition has been filed. Willfulness does not require that the creditor intend to violate the automatic stay provision, rather it requires that the acts which violate the stay be intentional." *Landsdale Family Restaurants Inc. v. Weis Food Service*, 977 F.2d 826, 829 (3rd Cir. 1992) (internal citations and quotation marks omitted).

24, 1995 "failed to specifically list as a potential assets of Debtor's estate any claims against General Motors or GMAC, "Appellant's Br. At 14, and 21, it vigorously denies taking two irreconcilably inconsistent positions in this case.

Krystal argues that although it did not list the instant claim as an asset in the October 24, 1995, Amended Disclosure Statement, the language of that disclosure was nevertheless adequate to inform creditors of claims Krystal had against GM and therefore they knew of the contingent asset of a potential damage award.

Alternatively, Krystal argues that even if the disclosure was insufficient, it could amend the disclosure statement under Bankruptcy Rule 1009 and thereby cure any inadequacy because the bankruptcy case is still open. Krystal insists that it did effectively amend the disclosure as soon as the Bankruptcy court notified Krystal of the possible application of the judicial estoppel[9] Therefore, argues Krystal, it legitimately cured "any conceivable defect in a previously filed schedule or non-disclosure." The Bankruptcy Court was not impressed by Krystal's eleventh hour candor and neither are we.

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[9] Krystal thereafter added the following amendment to Schedule B which asks disclosure of contingent and unliquidated claims:

> "Tort, contract and violation of automatic stay claims against General Motors Acceptance Corporation."

It also noted that it did not know the values of the claims.

As the Bankruptcy Court properly noted, the language in the Amended Disclosure Statement was "little more than boilerplate." It did not specify any of the claims contained in the instant complaint against GM, much less attempt to place any monetary value on them. We agree that such boilerplate language is simply not adequate to provide the level of notice required. The bankruptcy rules were clearly not intended to encourage this kind of inadequate and misleading disclosure by creating an escape hatch debtors misleading disclosure by creating an escape hatch debtors can duck into to avoid sanctions for omitting claims once their lack of candor is discovered.

> Allowing [Krystal] to back-up . . . and amend [its] bankruptcy filings, only after [its] omission has been [detected], suggests that a debtor should consider disclosing potential assets only if. . . caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the Bankruptcy Court with a truthful disclosure of the debtors' assets.

Burnes v. Pemco Aeroples, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002).

As noted above, judicial estoppel is properly applied only when appropriate to redress the problem the doctrine was designed to remedy. Krystal argues that the doctrine of judicial estoppel is too drastic to remedy to apply here because the "[p]lan calls for a one hundred (100%) percent payment to all creditors." Appellant's Br. At 22. However, as GM is quick to point out, full payment is contingent upon Krystal's

ability to sell its GM franchises for some undetermined profit. *See* App. 95, and 104, Appellee's Br. at 13. Moreover, GM represents without contradiction that Krystal still has not paid its creditors in full, and that the Amended Plan noted the necessity of Krystal's owner ("Pappas") getting creditors to compromise their claims. According to GM, creditors may not have been willing to compromise their claims as much, if at all, had they known of the possible addition of damages from the instant law suit.

C. Bad Faith

In *Oneida Motor Freight, Inc., v. United Jersey Bank*, 848 F.2d 414, 416-18 (3d Cir. 1988), we concluded that a rebutable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose. That is precisely Krystal's situation here. Accordingly, the record is sufficient to support the Bankruptcy Court's finding of bad faith.

1. Krystal's Knowledge of the Assets

Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing "adequate information" to "enable a creditor to make 'an informed judgment' about the Plan." 11 U.S.C. § 1125(a) (1). Debtors must be therefore identify and disclose all "property of the estate" including all of the debtor's "legal and equitable" property interests. This includes such contingent assets as any cause of action Krystal may have against GM, and Krystal does not argue to the contrary. The nature of Krystal's

purported misrepresentations here can fully be appreciated if we place them within the proper context.

"A long-standing tenet of bankruptcy law requires one seeking benefits under its terms of satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights" *Oneida*, 848 F.2d at 416. Therefore, "preparing and filing a disclosure statement is a critical step in the reorganization of a Chapter 11 debtor." *Id.* at 417. It has been called by one commentator, "the pivotal concept in reorganization of Chapter 11 debtor." *Id.*

> The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information.

Oneida, 848 F.2d at 417 (internal quotation marks omitted).

Krystal relies upon the history of this dispute in arguing that it did not have any claim to disclose until we ruled in *Krystal I*, that GM's termination of the franchise agreement violated the automatic stay. Until then, argues Krystal, the appropriate state agencies had ruled that GM properly terminated the franchise agreement and there was therefore no cause of action against GM to include in the disclosure statement of October 24, 1995. Therefore, according to Krystal, when the Bankruptcy Court confirmed the Plan in October of 1997, the "law of the case" was that (1) Krystal had no ownership interest in the dealership franchise and (2) GM had not violated the automatic stay provisions of the Bank

ruptcy Code. Therefore, there was no cause of action to disclose. Appellant's Br. at 21.

However, Krystal was aware of every allegation currently asserted in Counts II through VII of its complaint when it filed its Statement and Plan. Each of the events alleged in those counts had already occurred when Krystal made the applicable filings under the Bankruptcy Code. Moreover, Krystal's argument that it could not know that GM violated the automatic stay as it alleges in Count I, is also unpersuasive. Krystal clearly knew of this potential claim because it vigorously argued that GM violated the automatic stay when it appeared before us in *Krystal I*.

Although it is true that the relevant stat agencies had upheld GM's right to terminate the lease, the agencies were never asked to consider the issue of Krystal's alleged violation of the automatic stay, and Krystal knew this when it filed its disclosure statement in the Bankruptcy Court on October 24, 1995. The Vehicle Board's Adjudication and Order did to reach this issue, and the Commonwealth Court's November 6, 1995 decision had not yet been filed. Therefore the "law of the case" did not negate Krystal's duty to disclose its claim against GM.

Krystal's attempt to seek refuge in the law of the case doctrine ignores the scope of the disclosure requirement as well as the precise issues before the Vehicle Board and Commonwealth Court. The Code requires that a debtor list *potential* causes of action, not claims it actually intends to sue on at the time of the required disclosure. "It has been held that a debtor must disclose any litigation likely to arise in a non-

bankruptcy context." *Oneida*, 848 F.2d at 416. Thus, Krystal's own action belie its contention that it did not know it had a potential claim against GM. Krystal has consistently and vigorously maintained that GM's termination of the franchise agreement violated the automatic stay. That claim was not within the purview of the proceeding Krystal brought before the Vehicle Board or Commonwealth Court, and the record belies any argument that it was not then within Krystal's contemplation. To the contrary, it appears that Krystal continuously believed that GM had violated the automatic stay. Nothing here supports Krystal's current position that it had to await a court decision to disclose this potential claim. Moreover, Krystal ignores the rather damning fact that it included the franchise as an asset of the estate in its disclosure statement even though the Vehicle Board has already upheld GM's termination of it. App. at 142.

Although we do not require debtors to list hypothetical claims that are so tenuous as to be fanciful, we do require them to advise creditors of the kind of potential claims that Krystal is asserting here. "[C]reditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, [therefore] the importance of full and honest disclosure cannot be overstated." *Ryan*, 81 F.3d at 362.

The Bankruptcy Court properly concluded that Krystal had enough information prior to confirmation to know it might have a claim against GM. " '[I]f the debtor has enough information . . .prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed.'" *In re Costal*

Plains, 179 F.3d 197, 208 (5th Cir. 1999) (*citations omitted*). It is difficult to understand why Krystal would list the franchise as an asset after the administrative rulings upholding GM's termination of it and yet fail to disclose a potential suit against GM for what Krystal has always argued was an improper and ineffective cancellation other than an intent to hide the claim from creditors.

2. Krystal's Motive to Conceal the Claims

The Bankruptcy Court found that (1) Krystal's owner ("Pappas") agreed to contribute substantial funds toward the payment of claims and expenses associated with Krystal's reorganization and (2) the owner was also engaged in negotiating unsecured claims downward to minimize the amount Pappas would have to pay.[10] Krystal therefore had every reason to minimize its assets so that creditors would conclude they had no choice but to significantly compromise their claims and approve Krystal's reorganization. Indeed, the argument that Krystal made in support of its planned reorganization confirms this. The liquidation analysis Krystal set forth in its Disclosure Statement provides as follows:

> [S]ecured and priority claims far exceed the value of the Debtor's assets. This means that in the event of a liquidation no unsecured creditor will receive any dividend. In fact, it is most likely that in the event of a Chapter 7 liquidation secured and priority claims will not be paid in full.

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[10] GMAC's $114,486 claim was negotiated down to $23,000. App. 12.

> Although Debtor's proposed Plan actually amounts to a liquidation of all Debtor's assets, it is nevertheless asserted that all creditors will still be treated much better under the Plan than under a Chapter 7 liquidation. This is because the Plan provides for substantial cash payments to almost all creditors.
>
> The reason Debtor can propose cash payments under the Plan, and none can be expected under a Chapter 7 liquidation, is because Mr. Pappas is willing to contribute substantial cash toward the payment of claims and expenses associated with this reorganization.

App. 27. Against this background, it is undeniable that creditors should have been informed of this contingent asset.

3. Harm to Creditors

Judicial estoppel is only appropriate when the inconsistent positions are "tantamount to a knowing misrepresentation to or even fraud on the court." *Total Petroleum, Inc. v. Davis*, 822 F.2d 634-38 (8th Cir. 1987). Not surprisingly, Krystal reminds us of this, as well as the fact that the doctrine is to be used sparingly and reserved for the most egregious case. According to Krystal, employing that doctrine and the sanction of dismissal here was "overkill," even if the doctrine is otherwise appropriate.

This position is based upon Krystal's assertion that under the Plan, (1) the secured creditors receive 100% payment; (2) unsecured creditors received 75% and stand to receive full payment upon the sale of the franchise; and (3) the legal

claims are contingent assets of a highly speculative nature and therefore would have been valued at zero dollars even if disclosed. Krystal concludes that since the creditors experienced no financial harm, the court erred by finding that there was bad faith.

In making this argument, Krystal compares itself to the debtor in *Ryan*. There, we held that a Chapter 11 debtor-builder's failure to disclose causes of action against suppliers of allegedly defective wood trim in bankruptcy proceedings did not bar debtor from pursuing those claims outside of bankruptcy. Although the contingent assets represented by those claims were not disclosed in the bankruptcy proceedings, we rejected the Bankruptcy. Court's application of judicial estoppel because the debtor did not attempt to "play fast and loose" with the court.

We also held that the application of judicial estoppel does not turn on whether the estopped party actually benefitted from its attempt to play fast and loose with the court. We concluded that the presence or absence of any such benefit is merely a factor in determining whether the evidence would support a conclusion of bad faith. After raising the issue of whether Ryan actually received a benefit form the omissions there, we stated: "We readily conclude that the doctrine of judicial estoppel in this circuit contains no such requirement." 81 F.3d at 361. We then explained:

> the critical issue is what the [party] contended in the underlying proceeding, rather than what the jury found. Whether the party sought to be estopped benefitted from its earlier position or was

> motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, and independent requirement for application of the doctrine of judicial estoppel.

Id. (Internal citations and quotation marks omitted).

The totality of the circumstances in *Ryan* lead us to conclude that the debtor did not omit any information in bad faith. Ryan omitted certain assets from its disclosures, but it also omitted counterbalancing liabilities. Therefore, largely the "balance of assets and liabilities. . .may have been unaffected by the failure to list [certain] claims as assets." 81 F.3d at 363. Ryan did not benefit from the omission.[11] Despite Krystal's argument to the contrary, that is not the situation here.

The Bankruptcy Court could not accept Krystal's argument that its creditors were not harmed, and neither can we. The Bankruptcy Court also reasoned that the impact of this nondisclosure must be measured in more than monetary terms. Such nondisclosures affect creditors' willingness to negotiate their claims and enhance the debtor's bargaining

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[11] Because, as we have noted, the estopped party need not have benefitted fro the misrepresentation, we noted the absence of a benefit in *Ryan* only because it was relevant to an inquiry into that debtor's bad faith. For the same reason, we note that Krystal benefitted from the omission here. At the very least, the record certainly supports the Bankruptcy Court's finding that it tried to derive such a benefit.

position by making the pot that creditors look to for recovery appear smaller than it really is. That is particularly important here because, as noted above, Krystal's owner negotiated very substantial compromise of claims against Krystal.

4. Lesser Sanctions

The fact that a sanction is to be used sparingly does not mean that it is not to be used when appropriate. Applying a lesser sanction here (such as requiring Krystal to pay unsecured creditors the balance of their claims out of any damages Krystal might recover form the instant action) would reward Krystal for what appears to be duplicitous conduct in the course of its bankruptcy proceeding. Krystal would still reap the benefit of any recovery beyond the amount paid to satisfy outstanding debts. In addition, the integrity of both the bankruptcy process and the judicial process would suffer. In short, allowing Krystal the lesser sanction it advocates would send a message that "a debtor should consider disclosing potential assets only if he is caught concealing them." *Pemco*, 291 F.3d at 1288. The Bankruptcy Court was understandably reluctant to allow Krystal to use sleight of hand to show its cards to its creditors and so are we. Dismissal is necessary to prevent Krystal from profiting from its omission. It is also "required to preserve the integrity to the earlier proceedings. *Oneida,* 848 F.2d at 418.

5. Opportunity to Explain

Lastly, Krystal argues that the Bankruptcy Court's finding of bad faith is undermined by the absence of any testimony on this issue. It maintains that it never had an adequate op

portunity to explain. However, "[w]e have held that a District Court need not always conduct an evidentiary hearing before finding the existence of bad faith for judicial estoppel purposes." *Montrose Medical Group*, 243. F.3d at 780 n.5.

In *Oneida*, we held that if the pleadings who (1) that fact of non-disclosure of the assets combined with (2) a debtor's obvious knowledge of the existence of the asset, a court need not take testimony in order to make a finding of bad faith. Although the Bankruptcy Court here raised the issue of judicial estoppel *sua sponte*, the court gave Krystal the opportunity to fully brief this issue and gave both parties the opportunity for oral argument. We conclude that Krystal had a fair opportunity to argue that the doctrine did not apply and to ask the Bankruptcy Court not to dismiss its complaint. We find no error in the Bankruptcy Court's ruling, and we conclude that the District Court properly affirmed it.

III. CONCLUSION

For all of the above reasons, the judgment of the District Court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Courts of Appeals
for the Third Circuit

APPENDIX C – ORDER DATED JUNE 21, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Krystal Cadillac-Oldsmobile-GMC Truck, Inc. Appellant	: Civil No. 1:CV-00-2236
v.	
General Motors Corp. and General Motors Acceptance Corp., Appellees	:

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT:**

(1) The November 24, 2000 order of the bankruptcy court is **AFFIRMED.**

(2) The Clerk of Court shall provide a copy of this order to the United States Bankruptcy Court for the Middle District of Pennsylvania and close the file.

Dated: June 21, 2001

SYLVIA H. RAMBO
United States District Judge

APPENDIX D-MEMORANDUM OPINION FILED JUNE 21, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Krystal Cadillac – Oldsmobile-GMC Truck, Inc. Appellant	: Civil No. 1:CV-00-2236
v.	:
General Motors Corp. and General Motors Acceptance Corp., Appellees	:

MEMORANDUM

Before the court is an appeal from an order of the Bankruptcy Court for the Middle District of Pennsylvania dated November 24, 2000. The parties have briefed the issues, and the appeal is ripe for disposition.

I. Background

The relevant factual and procedural history is as follows:[12]Appellant, Krystal Cadillac-Oldsmobile-GMC Truck, Inc. ("Krystal") is the owner of a General Motors Corporation ("GM") franchise in Gettysburg, Pennsylvania. On July

[12] The instant appeal arises out of the bankruptcy court's decision to grant Appellees' motion to dismiss. Therefore, most of the background is obtained from allegation in Appellant's first amended complaint, or when necessary to supplement the procedural history, from various prior court opinion

13, 1993, GM notified Krystal of its intent to terminate the franchise effective August 12, 1993, because Krystal was in breach of the franchise agreement for failure to maintain a line of credit. On August 11, 1993, Krystal challenged the termination by instituting a proceeding before the Pennsylvania Board of Vehicle Manufacturers, Dealers, and Salespersons ("the Board"). On September 8, 1994, approximately three weeks before the Board rendered a decision, Krystal filed a petition under Chapter 11 of the Bankruptcy Code. On September 27, 1994, the Board entered an order permitting GM to terminate the franchise. Krystal appealed the Board's decision to the Pennsylvania Commonwealth Court which affirmed the Board's decision on November 6, 1995.

On June 15, 1995, Krystal filed with the bankruptcy court a plan of reorganization which provided for the sale of the GM franchise as a means to pay creditors. GM filed an objection to the plan, asserting *inter alia*, that the franchise had been validly terminated in the state proceedings and therefore was not an asset of the estate available for sale. GM raised the same objection to Krystal's amended reorganization plan which was filed on October 24, 1995.

On April 15, 1996, the bankruptcy court entered an order holding that is was precluded from authorizing the sale of the franchise because the franchise has been validly terminated in the state proceedings. On July26, 1996, the bankruptcy court denied Krystal and Trustee's joint motion for reconsideration. Krystal appealed the bankruptcy court's July 26 order to this court, which affirmed the bankruptcy court's decision on February 3, 1997, but was reversed by the Third Circuit Court of Appeals on April 23, 1998. The Third Cir

cuit held that GM's actions before the Board, the Pennsylvania Commonwealth Court, and the bankruptcy court were taken to obtain possession of the franchise agreement which was an asset of the bankruptcy estate because Krystal's bankruptcy petition was filed before the Board had found the franchise agreement properly terminated. *See In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.#d 631 (3rd Cir. 1998).

In the course of Krystal's bankruptcy, it filed a disclosure statement pursuant to 11 U.S.C. § 1125. Neither the disclosure statement nor the amended plan of October 24, 1995, made any mention of the existence of any claim against GM for any cause of action.

Krystal filed its complaint in the instant action in the District Court for the Eastern District of Pennsylvania on September 25, 1998. Krystal's seven-count amended complaint alleges the following causes of action: (1) violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(h); (2) breach of contract; (3) actions for damages under 15 U.S.C. § 1221 and 63 Pa. Cons. Stat. Ann. § 818; (4) conspiracy; (5) conversion; (6)tortuous interference with contractual relations; and (7) violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. With the exception of the automatic stay action in Count I, all of Krystal's claims are based on events which occurred prior to its filing of the bankruptcy petition in September 1994.

The Eastern District Court referred the captioned action to this court because these matters had roots in Krystal's bankruptcy action. Because Count I of the amended complaint

involved a "core" matter under 28 U.S.C. § 157(b), and the remaining counts were "related to" the bankruptcy under 28 U.S.C. § 157(c)(1), this court referred the entire matter to the bankruptcy court on June 11, 1999. The bankruptcy court dismissed all seven counts of Krystal;s amended complaint on November 24, 2000, finding that they should be precluded based on judicial estoppel. The bankruptcy court's order alternatively recommended that all seven counts should be dismissed based on the applicable statute of limitations or for failing to state a claim upon which relief may be granted. On December 22, 2000, Krystal appealed the bankruptcy court's decision to this court. The parties have briefed the judicial estoppel issue, as well as the other recommendations in the bankruptcy court's order.

II. Legal Standard: Bankruptcy Appeal

The court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 158(a). In reviewing the rulings of a bankruptcy court, a district court must accept the factual findings of the court below unless they are clearly erroneous; however, the court reviews conclusions of law *de novo*. *In re Brown*, 951 F.2d 564, 567 (3d Cir. 1991).

II. Discussion

The bankruptcy court's thoughtful memorandum and order of November 24, 2000, dismissed all seven counts of Krystal's amended complaint based on judicial estoppel. The bankruptcy court held that Krystal was required to disclose any potential causes of action in its October 24, 1995 reorganization plan and because it failed to disclose the causes of action asserted in the install litigation, it should be precluded

from asserting them now. Alternatively, the bankruptcy court's opinion recommended dismissal of all seven counts based on other reasons. Because this court agrees that Krystal's amended complaint should be dismissed based on judicial estoppel, it need not consider the other recommendations.

A. Applicable Bankruptcy Principles

To confirm a Chapter 11 reorganization plan, a debtor is required to first provide creditors with a disclosure statement which contains "adequate information," defined as such information as will enable a creditor to make an informed judgment about the plan. 11 U.S.C. § 1125. Adequate information would thus include a listing of all "property of the estate" which includes "all legal and equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1). This is found to be broad enough to encompass causes of action. *In re Kollar*, 176 F.3d 175, 178 (3d Cir. 1999) (citing *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 490 (3d Cir. 1997)). "Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417-18 (3rd Cir. 1988)).

The "best interests of creditors test" holds that a plan must pay to all creditors at least as much as they would receive if the case were one in Chapter 7. 11 U.S.C. §

1129(a)(7)(A)(ii). Therefore, to be able to fairly evaluate whether a creditor's interest will be best served through liquidation or reorganization, all possible assets of the bankruptcy estate must be included in the disclosure statement and plan, including potential causes of action. *In re Affiliated Foods, Inc.*, 249 B.R. 770 (Bankr. W.D. Mo. 2000) (citing *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1158 (5th Cir. 1988)). Thus debtors have an express, affirmative duty to include in their disclosure statements contingent and unliquidated causes of action from which they may recover damages. *In re Coastal Plains*, 179 F.3d 197, 207-08 (5th Cir. 1999); *Clark v. Trailiner Corp.*, 242 F.3d 388, 2000 WL 1694299 (10th Cir. 2000). "The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information....prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed. Any claim with potential must be disclosed, even if it is contingent, dependent, or conditional." *In re Coastal Plains*, 179 F.3d at 208 (quotations omitted).

B. Krystal's Bankruptcy

In the instant case, Krystal's liquidation analysis from the disclosure statement made no mention of any of the seven counts of the amended complaint in the captioned action.[13]

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[13] The liquidation analysis provides only the following:

As discussed before, secured and priority claims far exceed the value of [Krystal's] assets. This means that in the event of liquidation no unsecured creditor will receive any dividend. In fact, it is

"Thus, creditors were deprived of the opportunity to consider whether, instead of a prolonged and uncertain reorganization process, they would prefer simply to have Krystal's assets, including the instant causes of action, liquidated, in hopes of achieving a quicker payment of their claims, or a greater return on the dollar." (D.R. Doc. #1, Bankruptcy Mem. Of Nov. 24, 2000, at 10.)

Judicial estoppel is an inherent equitable authority possessed by the federal courts to sanction malfeasance. *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001). Three requirements must be satisfied before a district court may properly apply judicial estoppel: (1) the party to be estopped must have taken two positions that are irreconcilably inconsistent; (2) judicial

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most likely that in the event of a Chapter 7 liquidation secured and priority claims will now be paid in full.

Although [Krystal's] proposed Plan actually amounts to a liquidation of all [Krystal's] assets, it is nevertheless asserted that all creditors will still be treated much better under the Plan than under a Chapter 7 liquidation. This is because the Plan provides for substantial cash payments to almost all creditors.

The reason [Krystal] can propose cash payments under the Plan, and none can be expected under a Chapter 7 liquidation, is because Mr. Pappas is willing to contribute substantial cash toward the payment of claims and expenses associated with this reorganization.'

(Doc. #2, Designated Record at Doc. ("D.R. Doc.") #18, First Amended Disclosure Statement at 15.)

estoppel is unwarranted unless the party changed his or her position in bad faith-i.e., with intent to play fast and loose with the court; and (3) a district court may not employ judicial estoppel unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct. *Id.* At 779-780. In addition, "a court considering the use of judicial estoppel should ensure that the party to be estopped has been given a meaningful opportunity to provide 'an explanation' for its changed position." *Id.* At 780 n.5 (citing *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 807 (1999)).

1. Inconsistent Positions

With regard to the first requirement, the court agrees with the bankruptcy court that Krystal has taken two positions that are irreconcilably inconsistent. In the original bankruptcy action, Krystal failed to disclose any of the seven counts that it raises in the instant action. Therefore, in its October 24, 1995 disclosure and reorganization plan, Krystal took the position that it did not possess rights in the causes of action in this suit. However, by commencing the instant action, Krystal now takes the position that these assets did exist. These positions are irreconcilably inconsistent. This finding is in agreement with Third Circuit law. In *Montrose*, the court discussed its earlier opinion in Ryan:

> Indeed, the inconsistent "statement" in *Ryan Operations* had been accepted by a court...Prior to filing suit, the construction company had filed a voluntary petition under Chapter 11 of the Bankruptcy Code, which required it to disclose all assets

> and liabilities, including potential claims and causes of action. In violation of these requirements, the construction company's disclosure statement did not mention its claims against the manufacturer and suppliers. The reorganization plan was confirmed seven months after the construction company brought suit, and the defendants then moved for summary judgment on judicial estoppel grounds. In rejecting the district court's grant of judicial estoppel, we assumed without deciding that failure to comply with the Bankruptcy Code's disclosure obligations "can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial estoppel doctrine Id. at 362. But in that case, the parties' initial inconsistent "statement"-i.e., its failure to list its claims against the manufacturer and the suppliers in its original filing–had been implicitly accepted by the bankruptcy court when it approved the plan of reorganization.

243 F.3d at 783 n.8. Just as in *Ryan*, here the bankruptcy court implicitly accepted Krystal's earlier position that it did not possess rights in the causes of action now asserted.

2. Bad Faith

The court agrees with the bankruptcy court that the second requirement of judicial estoppel is also satisfied, that Krystal changed its position in bad faith. "A finding of bad faith 'must be based on more than' the existence of an inconsistency; indeed, a litigant has not acted in 'bad faith' for judi

cial estoppel purposes unless two requirements are met. First, he or she must have behaved in a manner that is somehow culpable. Second a litigant may not be estopped unless he or she has engaged in culpable behavior vis-à-vis the court." *Id.* at 781 (quotations omitted).

In *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 417 (3d Cir. 1988), the Third Circuit found judicial estoppel appropriate to dismiss the debtor's non-disclosed, post-confirmation lawsuit because the "combination of [the debtor's] knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose gave rise to an inference of intent sufficient to satisfy the requirements of judicial estoppel." Similarly here, Krystal had knowledge of the causes of action asserted in the captioned action at the time of its amended disclosure statement and amended plan of reorganization on October 24, 1995, and had a motivation to conceal the causes of action.

a. Knowledge of Claims

The events underlying Counts II thru VII of Krystal's amended complaint took place before September 1994 when Krystal filed the bankruptcy petition. The events underlying the § 362(h) stay violation of Count I began that time, September 1994, and continued through the course of the bankruptcy action. This was described by the Third Circuit:

> We can come to no other conclusion than that GM's actions before the Vehicle Board, the Pennsylvania Commonwealth Court, and the bankruptcy court were taken to obtain possession of the franchise agreement which we find to be an asset

> of the bankruptcy estate. Accordingly, GM's acts to enforce the state court's termination of the franchise agreement and to obtain possession of the GMC franchise violated the automatic stay provision of § 362(a)(3).

In re Krystal Cadillac Oldsmobile GMC Truck, Inc., 142 F.3d 631, 638 (3d Cir. 1998). The actions before the Vehicle Board and the Commonwealth Court were concluded on September 27, 1994 and November 6, 1995, respectively. GM's acts to enforce the state court's termination of the franchise agreement were during the course of the bankruptcy action and began at least as early as June 15, 1995, when GM objected to Krystal's original plan of reorganization. Thus, when Krystal filed its amended plan of reorganization with the bankruptcy court on October 24, 1995, Krystal had knowledge of all seven counts of the captioned action, including the stay violation.

Krystal does not appear to dispute its knowledge of the potential causes of action in October 1995. In fact, Krystal's January 10, 2001 brief of appellant, now before this court, admits its knowledge of the causes of action:

> In the Disclosure Statement, Krystal specifically discussed all of the essential facts which formed the basis for the instant 362(h) action, including: (1) that the Debtor claimed the GM franchise as an assert [sic] of the Bankruptcy estate; (2) that GM took action to terminate the franchise under the Chapter [sic] 11 filing; (3) that GM vigorously contested Krystal's ownership of the franchise; and

> (4) that litigation was underway to render a final determination between GM and Krystal. Moreover, in Krystal's Motion to Assume and Assign the franchise, and in briefs file din support of that motion (which occurred upon the Plan and Disclosure Statement filing), Krystal asserted GM's violation of the automatic stay.

(Doc. #5, Br. Of Appellant at 7.) Therefore, the next question is whether in addition to knowledge of the causes of action, Krystal also had a motivation to conceal their existence.

b. Motive for Concealment

Krystal did in fact have a motive for concealment of its causes of action against GM, namely to preserve the proceeds for itself instead of its creditors. Krystal asserts that it had no motive for concealment because its bankruptcy plan required a 100% payout to creditors. However, the 100% payout to unsecured creditors was not guaranteed, but was dependent on the sale of the franchise. In addition, the bankruptcy plan referred to the necessity of Harry Pappas, president of Krystal, infusing capital into Krystal. *See supra* n.2. Further, Mr. Pappas negotiated reduction of various claims of creditors, including GMAC.[14] Therefore, the more Mr. Pappas negotiated down the unsecured claims, the less capital he would need to infuse into Krystal and the greater his personal profit would be from the instant litigation. However, if the plan had disclosed the causes of action now asserted, creditors might have been less willing to negotiate

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[14] Mr.Pappas negotiated GMAC's $114,486.64 claim down to $23,000.00.

down their claims. *See In re Okan's Foods, Inc.*, 217 B.R. 739, 756 (Bankr. E.D. Pa. 1998) (failing to disclose § 1983 cause of action and preserving possible recovery for itself instead of creditors "constitutes bad faith," "evinces a reckless disregard for the rights of creditors and [Debtor's] statutory duties to provide accurate and sufficiently detailed information at various stages in the Chapter 11 bankruptcy process," "evinces the Debtor's intent to play fast and loose with the court," and warrants judicial estoppel); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) ("The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless's present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively.")

Krystal relies on the Third Circuit decision in *Ryan* where judicial estoppel was held not applicable in the Chapter 11 bankruptcy case. *Ryan* did not apply judicial estoppel, although the debtor failed to disclose its cause of action during bankruptcy, because the court found no evidence that the debtor acted in bad faith. 81 F.3d at 362. *Ryan* found, unlike *Oneida*, no basis in fact to hold that the debtor "deliberately asserted inconsistent positions in order to gain advantage-i.e., that it played fast and loose with the courts,." *Id.* at 363. The *Ryan* court did, however explain: "Although it may generally be reasonable to assume that the debtor who fails to

disclose a substantial asset in bankruptcy proceedings gains an advantage, the undisputed facts weigh against such an inference in this case.." *Id.*

Several factors were discussed by the court in *Ryan* including that the debtor's failure to list the claims as contingent assets was offset by its failure to list the corresponding claims of others against the debtor; "[a]s a result, the balance of assets and liabilities before the court and creditors when the reorganization plan was approved may have been unaffected by the failure to list the claims as assets." *Id.* In contrast, Krystal's "lack of disclosure left a considerable disproportion between assets and liabilities." *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 59 (Bankr. S.D.N.Y. 1999) (distinguishing *Ryan* and applying judicial estoppel in bankruptcy case). "Further, the plaintiff in *Ryan* brought the the undisclosed action while the bankruptcy case was still pending, pursuant to specific authorization from the bankruptcy court. In contrast, [Krystal] did not receive authorization from the bankruptcy court to pursue the instant action. Thus, the facts in this case do not weigh against the inference that 'a debtor who fails to disclose a substantial asset in a bankruptcy proceedings gains the advantage.' *Id.* (quoting *Ryan*, 81 F.3d at 363). Krystal fails to put forth any argument why the factors weighing against bad faith in *Ryan* apply to this action, or why any other factors weigh against judicial estoppel. Therefore, *Ryan* is inapposite, and the court finds that Krystal did deliberately assert inconsistent positions in order to gain advantage. Hence, Krystal's culpability is demonstrated. The court also finds that the second requirement of bad faith has been satisfied-Krystal has engaged in culpable

behavior vis-à-vis the court. As in *Oneida,* Krystal's "failure to list its claim against [the creditor] worked in opposition to preservation of the integrity of the judicial system which the doctrine of judicial estoppel seeks to protect." 848 F.2d at 419.

c. Krystal's Objections

In addition to the its alleged lack of motive, Krystal asserts a number of arguments against applying judicial estoppel, including: (1) the chronology of events prevented disclosure of Krystal's causes of action; (2) Krystal's disclosure was sufficient; (3) Krystal's amended schedule of assets cured its failure to disclose; and (4) the failure to disclose was a "minor technical failing." (Br. of Appellant at 9.) The court finds none of these arguments persuasive. As for the first argument, Krystal contends that it was not until April 23, 1998, when the Third Circuit ruled that GM had violated the bankruptcy stay, that Krystal could have asserted the § 362(h) cause of action of Count I. However, as discussed in Section III(B)(2)(a), *supra,* prior to Krystal's amended disclosure statement of October 24, 1995, GM had already violated the bankruptcy stay. Furthermore, there is no requirement that a § 362(h) claims need be preceded by a judicial determination that there has been a stay violation; indeed, the majority of such claims are asserted simultaneously with allegations of a stay violation, not subsequent to a determination.

With regard to the second argument, the facts which Krystal included in the amended bankruptcy plan and amended disclosure statement were not sufficient to alert creditors of the potential causes of action against GM. No creditor could

have discerned from Krystal's language that it was retaining the right to pursue any of the counts in the instant litigation. General, omnibus language will not suffice. *See in re Petrowax P.A., Inc.*, 200 B.R. 538, 541 (Bankr. D. Del. 1996); *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th cir. 1994) ("Noting the retention of the [bankruptcy] court's statutory jurisdiction to hear post-confirmation matters is a far cry from reserving to the debtors a right to bring post-confirmation claims...never disclosed by them during the pre-confirmation proceedings."). The third argument also fails because Krystal's amended schedule of assets cannot cure the failure to disclose the causes of action in the amended disclosure statement upon which bankruptcy court and creditors relied. *Oneida*, 848 F.2d at 418. Krystal's fourth argument fails because the bad faith concealment of the known causes of action is not a "minor technical failing." "Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated." *Ryan*, 81 F.3d at 362 (citing *Oneida*, 848 F.2d at 417-18).

3. Need for Judicial Estoppel

The third requirement of judicial estoppel is also satisfied; the sanction is tailored to address the harm caused by Krystal's misconduct and no lesser sanction would adequately remedy the harm. *Montrose*, 243 F.3d at 779-80, 784-85. Unlike in *Montrose*, where innocent third parties would be harmed by the use of judicial estoppel, *see id.* at 786, the only party negatively affected by the instant application of the sanction of judicial estoppel is Krystal, the party respon

sible for the misconduct. Without applying judicial estoppel, Krystal might benefit from its having "played fast and loose with the courts," *Ryan*, 81 F.3d at 363, regardless of whether any other sanctions are applied. The bankruptcy court adopted Krystal's plan, and the creditors are now subject to plan's finality. Any other sanction, e.g., monetary sanction or attorney's fee award from Federal Rules of Civil Procedure 11 or 37, or from 28 U.S.C. § 1927,will not necessarily be on proportion to Krystal's potential award based on its causes of action in this litigation. Any other sanction will not deter parties in bankruptcy from concealing known assets, depending on the potential magnitude of the cause of action concealed. Therefore, the court finds that judicial estoppel is the appropriate sanction in this case.

Montrose also requires that a "party to be estopped has been given a meaningful opportunity to provide 'an explanation' for its changed position." 243 F.3d at 780 n.5. While the bankruptcy court raised the issue of judicial estoppel *sua sponte* and did not hold any evidentiary hearings, this court is satisfied that Krystal has had ample opportunity through briefing the judicial estoppel issue before the bankruptcy court and before this court on appeal to provide an explanation for its changed position. Krystal has consistently failed to set forth any explanation for the changed position, but has only disputed the applicability of judicial estoppel.

IV. Conclusion

In accordance with the foregoing discussion, the court finds that the bankruptcy court was correct in applying judi

cial estoppel in dismissing Krystal's amended complaint. An appropriate order is attached.

SYLVIA H. RAMBO
United States District Judge

Dated: June 21, 2001.

APPENDIX E – MEMORANDUM OPINION FILED NOVEMBER 24, 2000
UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re:		
Krystal-Cadillac-Oldsmobile-GMC Truck, Inc., Debtor	:	Case No. 1-94-01547
Krystal Cadillac-Oldsmobile-GMC Truck, Inc., Plaintiff	:	
v.		
General Motors Corp. and General Motors Acceptance Corp, Defendants	:	Chapter 11

ORDER

AND NOW, this 24th day of November, 2000, the Complaint which had been filed in the Eastern District of Pennsylvania in the above-captioned matter and which was ultimately referred to this Court is hereby DISMISSED.

BY THE COURT

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ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE
HARRISBURG, PENNSYLVANIA

DATED: November 24, 2000

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re:

Krystal Cadillac-Oldsmobile-GMC Truck, Inc., Debtor	: Case No. 1-94-01547
Krystal Cadillac-Oldsmobile-GMC Truck, Inc., Plaintiff	: Chapter 11
v.	:
General Motors Corp. and General Motors Acceptance Corp., Defendants	:

For the Plaintiff: Gerard J. Jackson, Esquire
For the Defendant: James A. Mollica, Jr., Esquire

MEMORANDUM

Procedural History

Background

On September 25, 1998, the above-captioned matter was filed in the District Court for the Eastern District of Pennsylvania. In it, Debtor sought to recover compensatory and punitive damages on seven causes of action:

1) willful violation of the automatic stay;

2) breach of an automobile franchise agreement;

3) violations of both the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1221 and of Pennsylvania's Board of Vehicles Act, 63 P.S. § 818 et. seq.;

4) tortuous interference with contractual relations;

5) conversion;

6) conspiracy to commit the above-alleged acts; and

7) violation of the Sheman Anti-trust Act, 15 U.S.C. § 1 et seq.

Except for the automatic stay action, all allegations were based on events occurring prior to September, 1994.

Because these matters had roots in the Plaintiff's above-captioned bankruptcy, the Eastern District referred it to the Middle District Court. Because Count One of the Complaint involved a "core" matter under 28 U.S.C. § 157 (b), and the remaining counts were "related to" the instant bankruptcy under 28 U.S.C. § 157 (c) (1), the Middle District Court referred the entire matter to this Court.

Prior to the referral of the case here, the Defendants had filed a Motion to Dismiss all Counts of the Complaint. Reviewing that Motion in the context of certain prior pleadings and events in the bankruptcy case, I became concerned that judicial estoppel might preclude the Plaintiff from pursuing the instant causes of action because it had failed to include them as an asset in its Disclosure Statement and

confirmed Reorganization Plan. (These documents generally finalize the contents of the estates and seal the fate of both debtor and creditors alike.) As a result, I called a conference at which I requested each of the parties to address the following issues in a supplemental brief:

1. Whether a decision on the issue of judicial estoppel was "ripe" in light of the fact that only the Complaint and Motion to Dismiss had yet been filed.

2. If the issue were ripe, whether Debtor's failure to provide for the instant case in its disclosure Statement and Plan judicially estops it from pursuit of same.

Supplemental briefs were dully filed, and oral argument was held. In its brief, Debtor argued that dismissal of the case based on doctrine of judicial estoppel may be premature, but " to the extent the Bankruptcy Court considers the doctrine to be a matter for consideration at all" Debtor requested that a decision on the issue be rendered now.

For the reasons I will discuss below, I find that the matter is in fact ripe for decision and that the judicial estoppel doctrine applies.

Disposition of core and non-core matters

In "none-core matters, a Bankruptcy Court is ordinarily required to send to the District Court recommended findings of fact and conclusions of law. 28 U.S. C. § 157 (c) (1). The District Court then reviews the matter de novo and issues a final order. Because I will apply judicial estoppel to the

whole of the instant Complaint, no recommended findings of fact and conclusions of law will be necessary on the "non-core" Counts. Those Counts are part and parcel of a single asset- the lawsuit-which, as I will discuss below, should have been disclosed in the Disclosure Statement and Plan. The approval of a Disclosure Statement and Plan are "core" matters. 28 U.S.C. § 157 (b) (2) (L). While 28 U.S.C. § 157 (b) (2) generally limits the core jurisdiction of a bankruptcy court, that section does not preclude final jurisdiction over non-core matters that are subsidiary to core matters which are barred as a matter of law based on a theory or doctrine that "tends to negate the existence of a claim". *In re Chateaugay*, 111 B.R. 67 (Bankr. S.D.N.Y.1990); see also, *In re Standard Insulations Inc.*, 138 B.R. 947 (Bankr.W.D. Mo. 1992); *In re C & G Excavating, Inc.*, 217 B.R. 64 (Bankr. E.D.Pa. 1998) (bankruptcy courts cannot hear wrongful death claims, but can decide issues such as validity of proof of claim for wrongful death, thereby effectively passing judgment on claim itself, because proof of claim issue is core issue). Since the whole of the instant Complaint should have been disclosed in the Disclosure Statement and dealt with in the Plan in order for it to now be viable, then the Motion to Dismiss that Complaint may be granted as a "core" matter even over "non-core" counts.

These matters are not ripe for decision. I have jurisdiction pursuant to 28 U.S.C. § §157 and 1334. This matter is core pursuant to 28 U.S.C. §157 (b) (2) (a), (G) and (0).

Factual History

In 1987, Krystal Cadillac-Oldsmobile-GMC Truck (Debtor) entered into a Franchise Agreement ("the Franchise") with General Motors (GM). One of the terms of the Franchise required Debtor to maintain a "floor plan" of new GM vehicles. To finance its floor plan, Debtor obtained a line of credit form Defendant General Motors Acceptance Corporation (GMAC).

In or around October, 1991, GMAC terminated the line of credit and Debtor was unable to acquire other lines from other commercial lenders.

In March, 1992, GM notified Debtor that it was in breach of the Franchise for failure to maintain a line of credit. In May, 1993, GM notified Debtor that the Franchise would terminate in sixty days. The termination date was eventually set at August 12, 1993.

On August 11, 1993, Debtor appeals the termination to the State Board of Motor Vehicle Manufacturers, Dealers and Salesperson (Board), pursuant to a state law which allowed the Board to oversee such matters in the public interest. A hearing was held on August 2, 1994, at which both sides presented evidence. Before the hearing, counsel for Debtor requested a continuance because he had only recently been retained. The Board noted that this was Debtor's third counsel and denied the continuance.

On September 8, 1994, Debtor filed its Chapter 11 Petition. It does not appear that either GM or Debtor advised the Board of this filing.

Thereafter, on September 27, 1994, the Board issued an Adjudication and Order in which it upheld GM's termination decision.

The Debtor appealed the Adjudication to the Commonwealth Court of Pennsylvania. In its appeal, Debtor raised several arguments, including that the Board erred in not staying the proceeding in deference to the Bankruptcy Petition and its automatic stay.

In an opinion issued on November 6, 1995, the Commonwealth Court rejected these arguments and upheld the termination. The Commonwealth Court reasoned that

> [a]lthough the scope of the automatic stay is broad, the language in Section 362 (a) clearly states that proceedings against the debtor are stayed; closely relate claims by the debtor, which may benefit the bankruptcy estate, are not stayed. The dispositive question is whether a proceeding was originally brought against the debtor. In this case the proceeding was commenced by Krystal. . . and therefore the bankruptcy petition did not affect the ability of the Board, or this Court, to reach the merits of this case.

Memorandum Opinion, Slip op., No. 2730 C.D. 1994 (Pa. Commw. Nov. 6, 1995) (citations omitted; emphasis in the original).

On February 5, 1995, Debtor moved for an Order allowing it to assume and assign the Franchise. Gm objected to this on the grounds that the Franchise was already terminated and so

it could not be assumed. On July 26, 1996, I denied Debtor's Motion based on the decision of the Commonwealth Court, which, under law of the case principles, I considered to be controlling.

Debtor then appealed to the District Court and Ultimately to the United States Court of Appeals for the Third Circuit. GM defended its position through each Appeal.

Debtor prevailed on appeal. The Circuit held that "GM's" acts to enforce that state court termination. . . of the Franchise. . . violated the automatic stay provisions of § 362 (a) (3) ." The Circuit did not explicitly find that the stay violations was "willful" as §362 (d) requires in order for damages to be imposed. Not until after the Circuits decision was entered did the Debtor file the instant lawsuit in the Eastern District.

In the course of its bankruptcy, Debtor filed a Disclosure Statement pursuant to 11 U.S.C. §1125. The opening paragraph of the Disclosure Statement states that Debtor's purpose in filing it is to provide creditors with "that information which, in the opinion of the Debtor, is material, important and relevant." Neither the Disclosure Statement nor the Amended Plan made any mention whatsoever of the existence of a cause of action on the stay violation or any count of the instant Complaint.

Discussion

As indicated in the Procedural History, the issue now before me is whether a debtor may pursue to judgment a civil compliant whose "core" and "non-core" substance was not

disclosed to creditors prior to their acceptance of the Plan and its final confirmation.

Required contents of the disclosure Statement and Plan

To confirm a Plan, 11 U.S.C. §1125 (b) requires a debtor to first provide creditors with a Disclosure Statement which contains "adequate information", which §1125 (a) (1) defines as such information as will enable a creditor to make an "informed judgment" about the Plan. Adequate information would thus include a listing of all "property of the estate" which is defined to include "all legal and equitable interest of the debtor in property". 11 U.S.C. §541 (a) (1) This definition is board enough to encompass unliquidated causes of action. *In re Kollar, 176 F.3d 175, 178 (3rd Cir. 1999); Integrated Solution, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, 490 (3rd Cir. 1997); In re Nejberger, 394 F.2d 1300 (3rd Cir. 1991); In re Central Arkansas Broadcast Co., 68 F.3d 213, 214 (8th Cir. 1995)*(per curiam).

"Because creditors and the Bankruptcy Court rely heavily on the debtor's Disclosure Statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated." *Ryan Operations v. Santiam-Midwest Lumber Company, 81 F.3d 335, 362 (3rd Cir. 1996); see also, Oneida Motor Freight, Inc. v. United Jersey bank, 848 F.2d 414, 417 (3rd Cir. 1988); In re Eddington Thread Manufaturing Co., 881 B.R. 826, 829 (bankr. E.D. Pa. 1995)*

11 U.S.C. §1129 (a) (7) (A) (ii) sets fourth what is known as the "best interest of creditors test". Under this test, a Plan must pay to all creditors at least as much as they would re

ceive if the case were one in Chapter 7. Thus, the Disclosure Statement and Plan must contain information Sufficient to enable creditors to compare the amounts which they would likely receive if the case were one under Chapter 7 against what the Plan proposes to pay them in Chapter 11.

For such "liquidation analysis" to be full, complete and not misleading, all possible assets of the estate, including potential causes of action, must be included in it. *In re Affiliated Foods, Inc. 249 B.R. 770 (Bankr. W. D. Mo. 2000), Citing, In re Texas Extrusion Corp., 884 F.2d 1142, 1158 (5th Cir. 1988).* Otherwise, creditors cannot fairly evaluate whether their interest will be best served through liquidation or through reorganization.

In the instant case, the Debtor's liquidation analysis made no mention of any of the seven Counts of the instant Complaint. [15] Thus, creditors were deprived of the opportunity to

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[15] The liquidation analysis form the Disclosure Statement provided, in full, as follows:

Comparison of Plan Objectives to a Liquidation Case

As discussed before, secured and priority claims far exceed the value of Debtor's assets. This means that in the event of a liquidation no unsecured creditor will receive any dividends. In fact, it is most likely that in the event of a Chapter 7 liquidation secured and priority claims will not be paid in full.

Although Debtor's proposed Plan actually amounts to a liquidation of all Debtor's assets, it is nevertheless asserted that all creditors will still be treated much better under the Plan than under

consider whether, instead of a prolonged and uncertain reorganization process, they would prefer simply to have the Debtor's assets, including the instant causes of action, liquidated, in hopes of achieving a quicker payment of their claims, or a greater return on the dollar.

Debtors does not appear to contest that the instant causes of action belong to the estate. Rather, Debtor primarily argues that disclosure of them was not in fact necessary. Debtor is in error. Debtor have an express, affirmative duty to include in their Disclosure Statements contingent and unliquidated causes of action form which they may recover damages. *In re Costal Plains, 179 F.3d 197 (5th Cir. 1999); Clark v. Trailiner Corp. 2000 W.L. 1694299 (10th Cir.); In re Troutman Enterprise Inc., 244 B.R. 761 (Bankr. S.D. Ohio.2000);* rev'd on other grnds, 253 B.R. 1 (6th Cir. B. A. P. 2000)). " The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed." *Coastal Plains., at 208; citing, In re Envirodyne Industries, Inc., 183 B.R. 102, 821 fn. 17 (Bankr. N. D. 111. 1995). See also,*

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a Chapter 7 liquidation. This is because the Plan provides for substantial cash payments to almost all creditors.

The reason Debtor can propose cash payments under the Plan, and none can be expected under a Chapter 7 liquidation, is because Mr. Pappas is willing to contribute substantial cash toward the payments claims and expenses associated with this reorganization.

MDFC Loan Corp. v. First Shopping Center Partnership, 1996 W.L. 99909 (N. D. Ill.).

Debtor argues alternatively that through the following provisions of the Statement and Plan, it did in fact make a sufficient disclosure of the existence of the instant causes of action.

> At any time after confirmation, the Debtor may, so long as it does not materially or adversely affect the interest of creditors or reduce payments of claims, remedy any defect or omission, or reconcile any inconsistencies in the Plan, or in the Order of Confirmation, in such manner as may be necessary to carry out the purposes and effect of the Plan.
>
> * * *
>
> The United States Bankruptcy Court for the Middle District of Pennsylvania will retain jurisdiction until this Plan has been closed or fully consummated, or as otherwise order by the Court, including, but not limited to the following purpose:
>
> (b) Determination of all questions and disputes regarding title to assets of the Debtor's estate, and determination of all causes of action, controversies, whether or not subject to action pending as of the date of confirmation, between the debtor and any other party, including, but not limited to any right of the Debtor to recover assets, including accounts receivable, preferences and fraudulent convey

ances, pursuant to the provisions of the Bankruptcy Code.

(c) The correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in this Plan or the order of confirmation as may be necessary to carry out the purpose and intent of this Plan.

* * *

Debtor also hold and Automobile Franchise Agreement with General Motors Corporation. However, the Status of this franchise is now in litigation. General Motors termination the franchise prior to the commencement of the case and the matter was in litigation at the time the Chapter 11 petition was filed. General Motors nevertheless proceeded with termination and the matter is now on appeal in the Commonwealth Court. Debtor takes the position, which is vigorously contested by General Motors, that this franchise agreement remains an asset of the case.

This language is little more than boilerplate, nowhere specifically discussing any of the instant Counts. No creditor could discern form this language that the Debtor was retaining the right to pursue the instant suit. No provision attributes any monetary values to this or any other potential causes of action. The language a Plan uses to disclose the existence of potential lawsuits must be specific. General, omnibus language will not suffice. *In re Petrowax P.A., Inc.*, 200 B.R. 538, 541 (Bankr. D. Del. 1996); *Harstad v. First American*

Bank, 39 F.3d 899 (8th Cir. 1994) (Language which retains jurisdiction over "determination of all causes of action between debtors and any other party" is "a far cry" from kind of language necessary to preserve debtor's right to file post-confirmation actions on pre-petition claims, such as preference claims.)

Thus, Debtor's alternative argument also fails because none of these provisions even approximates a specific statement to the effect that the Debtor possesses a potential cause of action against GM and/or GMAC for damages for any of the kinds of causes of action alleged in the Complaint. These provisions were neither intended nor effective to enable creditors to make informed judgments about the impact of the instant causes of action on the acceptability of the Plan.

Those provisions, however, were final and binding. The general rule regarding the conclusiveness of confirmed Chapter 11 Plans is that "upon entry of the confirmation order, the reorganization plan is binding upon both the debtor and all creditors." In re *Emmer Brothers Co.* 52 B. R. 385 (D. Minn. 1986). See also, In re Gillingham, 150 B.R. 907, 909 (Bankr. W. D. Pa. 1993); In *re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991). Thus if a Plan does not deal with certain property, its confirmation bars a debtor form later claiming an interest in that property. *Emmer Bros.*, at 393. Further, 11 U.S.C.§1141 (b) provides that upon confirmation of the Plan, all property that remains within the estate re-vest in the reorganized entity. If property were not included in the Plan it never became property of the reorganized entity.

Applicability of Judicial Estoppel

Judicial estoppel is a common-law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position. In re Costal Plains, 179 F3d 197 (5th Cir. 1999); *In re Okan's Foods, Inc., 217 B.R. 739 (Bankr. E.D.Pa. 1998)*. Judicial estoppel . . . . is designed to prevent litigants form playing fast and loose with the Courts" *Ryan Operations*, 81 F.3d at 358; Okan Foods, 217 B.R. at 752; see also, *Coastal Plains, 179 F.3d at 208.* "The doctrine of judicial estoppel . . . applies when: (1) the party's position is inconsistent with a position taken in the same or previous proceeding and (2) the party asserted either or both of the inconsistent position in bad faith." *Crouse v. American Sterilizer Company, 126 F3d 494, 501 (3rd Cir. 1998); Okan Foods, at 752.*

Debtor asserts that through the language of the Disclosure Statement quoted at pages 11 and 12, above, it effectively did take the position that it could pursue the instant causes of action. However, as I have already established, that language did not have that effect. Therefore, I conclude that by omitting this suit form its Disclosure Statement and Plan, Debtor took the position that it did not in fact possess rights in this suit. Merely by filing the instant Complaint in the Eastern District, of course, the Debtor took the position that the asset did exist. Therefore, the element of inconsistent positions is evident from the pleadings now before me, and no evidence need be taken on the issue. The only question left to be answered is whether the pleadings are also sufficient to demonstrate that either of these positions was taken in bad faith.

Bad faith in any legal context is not often demonstrated in pleadings alone because the party accused of it rarely admits to it. Nonetheless, in the context of the requirements of the Bankruptcy Code for disclosure of asserts, a bad faith failure to disclose an asset can be found without the need for taking of testimony if the pleadings show the fact of non-disclosure of the asset combined with a debtor's obvious knowledge of the existence of that asset. *Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3rd 1998).*

In *Oneida,* the Circuit entertained an appeal from an Order granting a Motion to dismiss a non-disclosed, post-confirmation lawsuit by a former debtor. The Court found it clear that "Oneida had knowledge of this potential claim at the time it filed for bankruptcy. This combination of knowledge of the claim and a motive for concealment in the face of an affirmative duty to disclose gave rise to an inference of intent sufficient to satisfy the requirements of judicial estoppel." *Id at 417.* In the case before it, the Court found that testimony on the issue of bad faith was not needed because the debtor's non-disclosure gave creditors "a skewed sense of Oneida's financial condition and no knowledge of a claim that could inure to their benefit." *Id., at 417.* Therefore, the Circuit affirmed the order granting the Motion to Dismiss without a hearing.

Similarly, in the instant case Debtor obviously had knowledge of the claims it now asserts in Counts Two through Seven. There are no allegations in those particular Counts of any facts that were not known to the Debtor at the time it filed its Statement and Plan. Therefore, Debtor's bad faith in

failing to disclose these Counts is demonstrated in the pleadings.

The question of Debtor's "knowledge" of the stay violation claim of Count One is only slightly closer. Debtor argues that it could not have known of the stay violation until after the Circuit's decision was issued and found such violation, which decision was not made until long after the Disclosure statement had been filed and the Plan confirmed. In this argument, however, Debtor contradicts itself. Debtor obviously "knew of" the stay violation since it argued same before the Circuit. Debtor's knowledge of this violation was based on its belief that it still held an interest in the franchise when the Plan and Statement were filed. Given that belief, Debtor would have had some idea of the potential stay violation claim when its Plan was filed. Under the cases quoted above, Debtor should therefore have enclosed the existence of the potential stay violation cause of action.

Debtor also had a motive for concealment of these causes of action, so that it might preserve the proceeds for itself and not the use of creditors. Debtor asserts that it had nothing to gain in such concealment since its Plan called for a 100% payout to creditors. This ignores two factors (1) the 100% payout to unsecured creditors was dependent on the sale of the franchise and was therefore not a guarantee of a 100% payout; and (2) Harry Pappas, on behalf of the Debtor, nego

tiated reduction of various claims of creditors, including GMAC.[2] The Plan referred to the necessity of Mr. Pappas or a related entity infusing capital into the Debtor. Obviously, the more Pappas negotiated down the unsecured claims, the less capital he would need to infuse and the greater his personal profit would be from the instant litigation. But, if the Plan had disclosed the instant suit, creditors might have had less willingness to negotiate down their claims.

The instant facts are comparable to those in *Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982).* In that case, a debtor corporation failed to disclose an antitrust cause of action as one of its assets during its Chapter 11 case. After the confirmation of its Plan, the debtor assigned its cause of action to is principal shareholder, who then commenced a lawsuit. The defendant's moved to dismiss on the grounds that since the debtor had not disclosed the antitrust claims as an asset in its Chapter 11, the claim did not re-vest in the debtor upon plan confirmation and could therefore not be assigned

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[2] GMAC filed a proof of claim in the amount of $114,486.65. Debtor filed an objection to the claim. Thereafter, Pappas negotiated the claim to $23,000.00. Later, GMAC attempted to upset this settlement on the basis that there was a time limitation for payment. At several points during a hearing on that issue, GMAC's representative who had negotiated with Pappas testified that a great part of the reason for such a substantial reduction in its claim was simply GMAC's prior experiences and difficulties in dealing with Pappas. GMAC simply wanted to obtain some satisfaction from the Debtor and be done with Mr. Pappas.

to the plaintiff. The Ninth Circuit affirmed the dismissal of the action, holding that undisclosed assets were not "dealt with" in the plan, and therefore did not become vested in the debtor at confirmation.

Like the court in Stein[3] the Court in *Emma, supra,* reasoned that "if a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests." *Emmer at 393.* Thus it is understood that when judicial estoppel is applied against matters omitted from Disclosure Statements, the purpose is not to allow the defendant entity to use a technicality to evade a responsibility, the purpose is to dissuade all debtors from intentionally diverting a valuable asset from the bankruptcy estate.

Application of Judicial Estoppel sua sponte

As I previously stated, the issue of judicial estoppel was not raised by either Defendant in the instant case. While a federal trial court may on its own initiative enter an order

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[3] *See also, In re Okan's Foods, Inc., 217 B.R. 739, 756 (Bankr. E.D. Pa. 1998)* (Chapter 11 debtor judicially estopped from pursuing previously undisclosed §1983 claim against creditor-landlord; all facts relating to cause of action were known to debtor pre-confirmation but debtor failed to disclose facts in its schedules or disclosure statement); *In re H & L Developers, Inc., 178 B.R. 73-74 (Bankr. E.D. Pa. 1994)* (Chapter 11 debtor's failure to disclose potential pre-petition breach of contract and tort claims against vendor estopped debtor from litigating claims post-confirmation).

dismissing an action, it must first afford the plaintiff party an opportunity to respond. "A district court may grant summary judgment sua sponte if it gives notice and an opportunity to oppose summary judgment." *Joe Hand Promotions, Inc. v. Rennart Street Enterprises, Inc., 954 F.Supp. 1046 E. D. Pa. 1996, citing, Otis Elevator Co., v. George Washingon Hotel Corp., 27 F.2d 903 (3rd Cir. 1994). See also, Banks v. Lackawanna County Commissioners, 391. F.Supp. 359 (M.D.Pa. 1996); Bowman v. Brand Insulations, Inc., 621 F.2d 556 (3rd Cir. 1980).* In the instant matter, the Debtor was given opportunities to both brief and orally argue the issue of judicial estoppel. In its brief, Debtor requested that a decision be made at this time on the basis of judicial estoppel if I found it to be applicable. The requirements of due process are satisfied. The Motion to Dismiss may be and shall be granted without testimony.

Substance of the various Counts of the Complaint

Although I am convinced that dismissal of the entirety of the instant Complaint is in order, I also find it appropriate to address at some length the merits of the Motion to Dismiss the various Counts of the Complaint.[4]

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4 In addressing the merits of each Count, I recognize that when a court decides a Motion to Dismiss, it must treat the facts alleged in the Complaint as true, construe the Complaint in the light most favorable to the non-moving party, draw all reasonable interferences that can be drawn there from in favor of the non-moving party, and ask whether, under any reasonable reading of the Complaint, the non-moving party may be entitled to relief. *See, Kehr*

Count One- Violation of the Automatic Stay under §362 (a) (3)

The filing of a bankruptcy petition stays "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. §362 (a) (3). The Circuit expressly concluded that GM's actions before the Board, the Commonwealth Court, and this Court were all in an effort to obtain possession of estate property - the Franchise. The Circuit concluded that GM's actions to enforce the state Court's decision violated the stay. The Circuit's decision was silent as to whether the violation was willful.

A debtor seeking damages for a stay violation bears the burden of proof as to the violation, its willfulness, and the amount of damages. *In re Atlantic Business and Community Corp., 901 F.2d 325, 329 (3d Cir. 1990); In re Lansdale Family Restaurants, Inc., 977 F.2d 826 (3rd. Cir., 1992).*

A good faith but mistaken belief that one's actions are not a violation of the stay is no defense, *Landsale, at 829,* but good faith based on "persuasive legal authority: that one's actions do not violate the stay may lead to a conclusion that the violation was not "willful". *In re University Medical Center, 973 F.2d 1065 (3d Cir. 1992).* In University, the Circuit held that the United States had "unwillfully" violated the stay by withholding payments for post-petition Medicare services in a effort to recover post-petition overpayments. The Court found the applicable non-bankruptcy law "uncer

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Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1410 (3d. Cir.), cert. denied, 111 S.Ct. 2839 (1991).

tain" such that the government "could reasonably have believed that its action were in accordance with the stay" and so it was justified in pursuing its interpretation of the law. *Id., at 1088. See also, In re Roche, 228 B.R. 102 (Bankr.M.D.Pa.1998)* (exception to otherwise mandatory stay violation damages are recognized by University if creditor actions are consistent with " contemporaneous interpretations of § 362").

In the instant case, GM's actions, like those of the United States in *University*, "were neither in defiance of a court order nor were they contrary to . . . contemporaneous interpretations of sections 362 and 365." *University*, at 1088. Indeed, GM's actions were both in support of and supported by the various orders form the Commonwealth Court, the District Court and this Court. The law regarding the application of the stay was sufficiently uncertain that GM reasonably could have believed its actions to be in accord with the stay. Therefore, Defendants' violations of the stay was "unwillful"[5] under *University*.

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[5] When GM came before me, it has authority from Commonwealth Court stating that the stay did not apply. Of course, as the Circuit points out, the Commonwealth Court based its Decision solely on subsection 365 (a) (1) and did not consider subsection 362 (a) (3). This distinction between subsections does not diminish GM's argument that, in its objections before me, it was generally relying on persuasive legal authority. Under *University*, the existence of such authority was sufficient to negate the element of intent under either subsection of Section 362.

In addition, Debtor concedes that all litigation before the Board, except for the issuance of the Adjudication itself, was completed long before the Petition was filed and the stay was in place. There is no allegation in the Complaint that either Defendant engaged in any kind of volitional conduct before the Board post-Petition. The only Board action that occurred post-petition was the issuance of the Adjudication. Thus, what Debtor effectively seeks in this action is to hold GM accountable for an act preformed by the Board, an autonomous regulatory body of the Commonwealth. There is obviously no merit in such action.

Count Two-Breach of Contract

The Complaint alleges no less than fourteen ways in which the Defendants breached the Franchise, e.g. by refusing to extend Debtors' line of credit and by unilaterally terminating the Franchise. The sundry other breaches are generally comprised of allegations about Defendants' conduct prior to the Board action. None of the allegations refer to GM's litigation before the Board. The Defendant's primary response to all charges of this Count is that the cause of action is precluded by a four year statute of limitations in Pennsylvania. Debtor counters that the Franchise is governed by Michigan law, which permits a six year statute of limitations.

The Franchise Agreement states simply that "[t]his agreement is governed by the laws of the state of Michigan." as GM pointed out in oral argument, choice of law clauses in contracts do not adopt the statute of limitations unless the reference is expressed in the contract. *Gluck v. Unisys Corp.*

960 F2d 1168 (3rd Cir. 1992), citing, Federal Deposit Ins. Corp v. Peterson, 770 F.2d 141, 142 (10th Cir. 1985); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981). Thus, the Pennsylvania statute of limitations applies and the cause of action is time barred as pertaining to any actions by GM and GMAC before September 25, 1994. The numerous and somewhat vague allegations of Count Two deal with a time period and alleged events that pre-date the Board's September 27, 1994 Adjudication. Thus, even if judicial estoppel did not apply, I would be inclined to recommend that the District Court grant the Motion to Dismiss because this Count appears to be time-barred.

Count Three- Violation of the Federal Dealers' Day in court Act and the Pennsylvania Board of Vehicles Act

GM again raises a statue of limitations arguments as to this Count. Debtor's cause of action in this Count is one created by state law, and not by contract or by common law. Specifically, the controlling statute is the Board of Vehicles Act (BVA), 63 P.S. §§818.9 and 818.20 (a). Debtor cannot assert Michigan's statute of limitation to extend its rights under a statutory cause of action created by a Pennsylvania law. The limitation period created by this Pennsylvania law applies. That period is two years, and so the BVA violations would need to have occurred after September 25,1996 in order to be viable in the instant proceeding. [6] Debtor admits the

[6] 42 Pa. C.S.A. § 5524 provides as follows:

"the commencement of the initial wrongful acts relating to the . . .termination of Plaintiff's line of credit with GMAC initially occurred in 1991" (Answer to Motion to Dismiss, p. 4), a time obviously outside of the limitations period. Debtor argues, however, that GM and GMAC engaged in a continued pattern of conduct in furtherance of those seminal violations of the BVA (Answer to Motion to Dismiss, p. 4). The question here is whether the BVA contemplates a "course of conduct" violation that would retrospectively extend the statue of limitations.

Debtor does not cite a specific provision of the BVA in its complaint. I have reviews the BVA and have found the following provision instructive.

> It shall be violated for any manufacture, . . . or agent or any representative whatsoever of such manufacturer. . . to unfairly, without due regard to the equities of said dealer and without just provocation, cancel the franchise of any vehicle dealer . .

63 P. S. § 818.9.

The following actions and proceedings must be commenced within two years:

(5) An action upon a statue for a civil penalty of forfeiture.

In the instant case, the Franchise was, from GM's perspective, "canceled" when the Board issued its Adjudication in September, 1994, a time outside the statute [7] of limitations. There is no language in Section 818.9 to indicate that anything that the manufacturer would do pursuant to such cancellation would constitute a "new" act commencing a "new" limitations period. Thus, as with Count Two, I would be inclined to recommend that the District Court dismiss this Count as well, even if judicial estoppel did not apply.

Similar reasoning applies to the action pursuant to the Federal Dealers Day in Court Act (FDDA), which provides as follows:

> An automobile dealer may bring suit against any automobile manufacture . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer. . . to act in good faith in performing or complying with any of the terms or provisions of the franchise or in terminating . . . the franchise with said dealer: Provided that in any such suit the manufacturer shall not be barred from asserting in defense. . . the failure of the dealer to act in good faith.

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[7] Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortuous conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except and action or proceeding subject to another limitation specified in this subchapter.

15 U.S.C.A. § 1222.

The statute of limitations of FDDA actions is three years from the date the cause of action "accrued". 15 U.S.C.A § 1223. The cause of action accrues and the statue of limitations begins to run on the date the acts of alleged bad faith were carried out and not the date the franchise was actually terminated. *Pearson v. Ford Motor Co., 865 F. Supp. 1504 (N.D. Fla. 1994)*.

Applying *Pearson* to this case, the statue would have Run out in 1994, three years after GM first notified Debtor of its intent to terminate. Since the instant action was not filed until 1998, any activity during 1994 would be precluded by the statue of limitations from inclusion in this suit.[7]

Count Four-Conspiracy

Debtor alleged generally that GM and its wholly owned subsidiary, GMAC, conspired to deprive it of its Franchise by and through GM's Plan to eliminate certain dealerships by the year 2000. GM argues that the factual averments of the Complaint are legally deficient because they do not specify exact actions by GM in furtherance of the conspiracy. "A

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7 See also, *Colonial Ford, Inc. v. Ford Motor Co., 577 F2d 106 (10th Cir. 1978)*, where the Court held that actions outside the limitations period could be basis for a suit under this Act if such ad direct consequences on the liquidity of the dealership, but such consequences could not have been ascertained until a time within three years of termination of the franchise. *Colonial Ford* is of no help to Debtor's cause because Debtor obviously could have (and in fact had) "ascertained" its rights to the instant suit more than three years before termination of the franchise.

general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a case of action.... . [;] plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment." *Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3rd Cir. 1991), citing black & Yates v. Mahogany Ass'n, 129 F.2d 277, 231-32 (3rd Cir. 1942).*

Count Four incorporates by reference all of the ninety-eight averments preceding it. None of those averments contain specific allegations of fact as to the means by which the parties carried out their conspiratorial planning or the object of that conspiracy.

The complaint does not specifically allege any involvement of GMAC in the plotting of the alleged conspiracy. While the Complaint does state that "Project 2000 also included a program whereby GM, acting in concert with General Motors holding (sic) Corporation, planned to obtain control of certain. . . GM franchises" this statement does not an unlawful conspiracy make. There is nothing unlawful in GM desiring to acquire or control one or more of its franchises.

Thus, if judicial estoppel did not apply, I would nonetheless recommend that the District Court find that Debtor has failed to state a claim upon which relief can be granted and that this Count should be dismissed.

Count Five- Conversion

Conversion is a state law cause of action. *In re Harry Levin, Inc., 175 B.R. 560 (Bankr. E.D.Pa. 1994).* Under both

Pennsylvania and Michigan law, the tort of conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial or inconsistent with the rights therein. *Baram v. Farugia, 606 F.2d 42, 43 (3rd Cir. 1979); Bernhardt v. Needleman, 705 A.2d 875 (Pa.Super. 1997); Thomas v. Tracy Motor Sales, Inc., 104 N.W.2d 360 (1960).* Proof of wrongful intent is required to support a claim of conversion. *Baram, at 43; Thomas, at 365.*

In the instant case, the action (within the limitation period) allegedly committed by GM was its interference with Debtor's use or possession of the Franchise by objecting to the assumption and sale of the Franchise. GM had the legal backing of the Board and Commonwealth Court when it filed its objections. Under such circumstances, I would be unable to find that GM had the intent necessary for liability on a cause of action in conversion. Although the Circuit ultimately found GM's legal justification erroneous, the existence of such justification at the time of the alleged conversion is sufficient to demonstrate that Debtor would never be able to satisfy its burden of proof on the element of intent. Therefore, my recommendation to the District Court would have been that Count Five be dismissed on its merits.

Count Six-Tortious Interference with Contractual Relations

This count alleges that GM willfully interfered with Debtor's relationship with GMAC by inducing an/or instructing GMAC to terminate Debtor's line of credit, thereby giving GM cause to terminate the Franchise.

> [T]ortious interference with a business relationship only arises under circumstances in which im

proper conduct by a defendant causes or induces another not to deal with the plaintiff:

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another.

Northern Plumbing & Heating, Inc. v. Henderson Bros., Inc., 83 Mich.App. 84, 93, 268 N.W.2d 296 (1978), quoting 45 Am.Jur.2d, Interference, §50, p. 322.

The statute of limitations would also preclude the instant count from being prosecuted at this time. Again, the limitations period, according to Pennsylvania law, would preclude prosecution based on any actions by GM or GMAC prior to September 24, 1994. As I have previously noted, all actions by GM and GMAC to "conspire" to deprive the Debtor of the Franchise occurred well before 1994. Therefore, all of those counts which refer to such conspiracy are time barred,

and would subject this case to dismissal by the District Court.

Count Seven-Violation of Sherman Anti-trust Act

The Complaint at Count Seven alleges that GMAC deliberately sabotaged Debtor's retail sales by refusing to accept and approve financing applications from Debtor's customers. It avers that GM and GMAC "engaged in contracts, agreements, combinations and/or conspiracies in unreasonable restraint of trade and/or commerce among the several states". (Complaint at paragraph 139). It further avers that GM intended to draw Debtor's customers away and divert them to dealers who competed with the Debtor, for the purpose of driving Debtor out of business.

To establish a violation of the restraint of trade provisions of Sherman Antitrust Act, a plaintiff must prove that the defendants engaged in concerted actions, which produced anticompetitive effects within the relevant product and geographic markets, that the objectives of the concerted actions were illegal, and that such plaintiff was injured as proximate result of concerted action; without proof of all of these elements, a plaintiff cannot maintain a Sherman Act claim. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3rd Cir. 1993.)*

Debtor seeks treble damages in his complaint. The Clayton Act, 15 U.S.C. § 15, requires that "an antitrust plaintiff seeking treble damages must prove three elements: (1) an antitrust violation. . .; (2) the fact of damage or injury; and (3) measurable damages." *Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 206, 207; 209 (3d Cir.1983); Deaktor v.*

Fox Grocery Co., 475 F.2d 1112, 1116 (3d Cir.), cert. denied, 414 U.S. 867 (1973).

To prove restraint of trade by either monopolization or attempted monopolization, a plaintiff must present sufficient evidence to permit a jury to find that the defendant possessed the requisite market power necessary to constitute a monopoly. *United States v. DuPont & Co., 351 U.S. 377, 393 (1956).* "The market power analysis begins with a definition of the relevant product market for the particular product...." *Id.* Without a definition of the relevant market, the defendant's ability to exclude competitors cannot be determined. *Walker, Inc. v. Food Machinery, 382 U.S. 172, 177-78, (1965); Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 117 (3d Cir.1980), cert. Denied, 451 U.S. 911 (1981); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir.1975).* The outer boundaries of a product market are determined by the reasonable interchangeability of use between the product itself and substitutes for it. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, (1962); DuPont & Co., 351 U.S. at 393.*

In the matter before me, Debtor has not alleged a product market. The bare-bones complaint does not truly allege activities intended by GM to create for itself a monopoly on the sale of its vehicles. Rather, it alleges that GM intentionally caused customers to take their business to other dealers. While such conduct may constitute tortuous interference with contractual relations, it does not constitute a violation of the Sherman Act, and so Count Seven might, like all prior counts, be recommended for dismissal.

The instant Complaint will be dismissed based on principles of judicial estoppel. An appropriate order will follow.

BY THE COURT

ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE
HARRISBURG, PENNSYLVANIA

APPENDIX F – MEMORANDUM AND ORDER, DATED MARCH 1999

Krystal Cadillac-Oldsmobile-GMC Truck, Inc.	: Civil Action :
v.	: No. 98-CV-5119
General Motors Corporation and General Motors Acceptance Corp.	: :

MEMORANDUM AND ORDER

JOYNER, J. **March , 1999**

Now pending before this Court are the Defendants' Motions to Dismiss the Plaintiff's Amended Complaint and to Transfer this Case to the United States District Court for the Middle District of Pennsylvania. For the reasons which follow, we shall grant the defendants' motion to transfer and shall leave the motion to dismiss the amended complaint to the Middle District for decision.

History of the Case

Beginning in November, 1990, Plaintiff, Krystal Cadillac-Oldsmobile GMC Truck, Inc., operated an automobile/truck dealership in Gettysburg, Pennsylvania pursuant to a written franchise agreement with the General Motors Corporation. Under that franchise agreement, which was to remain in effect at least until October 31, 1995 so long as Plaintiff fulfilled its obligations thereunder, Krystal Cadillac was

required to have and maintain a separate line of credit from a financial institution to finance its purchase of new vehicles.

According to the Amended Complaint, in October, 1991, defendant GMAC, the financing arm of General Motors which had been providing plaintiff's financing, unilaterally terminated the line of credit upon which plaintiff had been relying to purchase its new vehicle inventory from GM. While plaintiff was trying to secure a substitute line of credit, however, it received a letter from General Motors dated March 6, 1992 that it considered plaintiff to have breached the franchise agreement and that if the situation were not corrected or explained to GM's satisfaction within thirty days, the GM and its divisions could terminate the Dealer Agreements. Plaintiff contends, however, that it was unable to secure alternative financing because potential lenders were under the perception that the franchise was either canceled or on the verge of cancellation.

Thereafter, on May 13, 1993, GM notified plaintiff that the Dealer Franchise would terminate in sixty days or on July 13, 1993. This termination date was later extended to August 12, 1993. One day prior thereto, plaintiff filed an appeal of the termination to the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons (the "Vehicle Board") under the Pennsylvania Board of Vehicles Act, 63 P.S. § 818.1, et seq. The Vehicle Board held a hearing on August 2, 1994 but before it issued its decision upholding the termination, on September 8, 1994, Krystal Cadillac filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Pennsylvania.

Among the central issues before the Bankruptcy Court and subsequently on appeal before the U.S. District Court for the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit, was whether the dealer franchise was an asset of the bankrupt debtor's estate and thus subject to sale to satisfy the claims of plaintiff's creditors. Both the July 26, 1995 decision of the Bankruptcy Court and the February 3, 1997 decision of the U.S. District Court for the Middle District held that as the Vehicle Board and the Pennsylvania Commonwealth Court had found that termination of the franchise was proper and occurred prior to the filing of the bankruptcy petition, the franchise could not be an asset of Krystal's bankruptcy estate. The Third Circuit Court of Appeals, however, reversed and in its opinion of April 23, 1998, held that the franchise was an asset of the estate and that General Motors' actions in trying to enforce that state courts' termination of the franchise agreement violated the automatic stay provision set forth in §362(a) of the Bankruptcy Code, 11 U.S.C. §362(a) (3).

Plaintiff then commenced this lawsuit on September 25, 1998 against GM and GMAC seeking to recover compensatory, actual, punitive and general damages for violation of the automatic stay provision, breach of contract, violations of the Automobile Dealers' Day in Court Act, 15 U.S.C. §1221, et seq. and the Board of Motor Vehicles Act, 63 P.S. §818, et seq. By way of the now-pending motions, Defendants seek to have this case dismissed pursuant to Fed.R.Civ.P. 12(b) (6) and/or transferred to the U.S. Bankruptcy Court for the Middle District of Pennsylvania.

Discussion

Defendants contend that this case should be transferred to the United States Bankruptcy Court for the Middle District of Pennsylvania because the plaintiff dealership is located in that district and it is there that plaintiff filed its petition for voluntary bankruptcy under Chapter 11. Defendants further contend that this case is therefore a "core" matter within the bankruptcy court's jurisdiction.

It is axiomatic that jurisdiction over Title 11 matters lies with the district court, although the district courts routinely refer most bankruptcy cases to the bankruptcy court. *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1175 (3rd Cir. 1996) citing *In re Marcus Hook Development Park, Inc.*, 943 F.2d 261, 264, n.3 (3rd Cir. 1991); 28 U.S.C. §157(a). Potentially, the bankruptcy court has jurisdiction over four types of title 11 matters, pending referral from the district court: (1) cases under title 11, (2) proceedings arising under title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11. *Id.*

For a proceeding to arise under title 11, the relief sought must be based on a provision of title 11. *In re Colbert v. Anderson,* 117 B.R. 51, 53 (Bankr.D.Conn. 1990) citing, inter alia, *Wood v. Wood,* 825 F.2d 90, 97 (5th Cir. 1987). For a proceeding to arise in a case under title 11, it must be one which would not exist but for the bankruptcy case. *Id.* On the other hand, a proceeding is relating to bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984); *In re Col*

bert, supra. A key word in this test is "conceivable"—certainty, or even likelihood is not a requirement. *Marcus Hook,* 943 F.2d at 264. Thus, bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on the debtor's rights, liabilities, options, or freedom of action or the handling and administration of the bankrupt estate. *Id.,* citing *In re Smith*, 866 F.2d 576, 580 (3rd Cir. 1989) It should be noted that a bankruptcy case is considered to still be pending until such time as the estate has been fully administered, the court has discharged the trustee and closed the case. *In re Emerson Radio Corp.*, 52 F.3d 50, 54 (3rd Cir. 1995); 11 U.S.C. §350.

Whether a particular proceeding is core represents a question wholly separate from that of subject-matter jurisdiction. Under 28 U.S.C. §157, a bankruptcy court might have jurisdiction over a proceeding, but still might not be able to enter final judgments and orders. *Marcus Hook*, 943 F.2d at 266. Indeed, under 28 U.S.C. §157(b)(1), "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section and may enter appropriate orders and judgments, subject to review under section 158 of this title." Section 157 (b) (2) set forth a nonexhaustive listing of core proceedings, including "matters concerning the administrations of the estate." 28 U.S.C. § 157 (b) (2) (A).

In addition to the examples outlined in Section 157 (b) (2) (A) through (O), our circuit precedents have further held that a proceeding is core if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could

arise only in the context of a bankruptcy case. *Guild and Gallery*, 72 F.3d at 1178; *Marcus Hook*, 943 F.2d at 267. Non-core proceedings include the broader universe of all proceedings that are not core proceedings but are nevertheless "related to" a bankruptcy case. *Halper v. Halper*, 164 F.3d 830, 837 (3rd Cir. 1999). In other words, if the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy, it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under section 157 (c) (1), it is an "otherwise related" or non-core proceeding.

In adversary proceedings in which a bankruptcy court is presented with a mixture of core and non-core claims, the court is required to apply a claim-by-claim approach to determine the extent of its jurisdiction to hear each. *Halper*, 164 F.3d at 839-840. Thereafter and based upon this analysis, the court may either enter final judgment or submit proposed findings of fact and conclusions of law to the district court. *Id.*

In moving for transfer, Defendants invoke several statutes which govern changes of venue both generally and with respect to bankruptcy and bankruptcy-related cases in particular. 28 U.S.C. §1404 governing venue changes in general first provides, in pertinent part:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature, or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. . .

28 U.S.C. §§1408 and 1409, which dictate where venue in bankruptcy and bankruptcy-related cases lies, similarly provide in relevant part,

> **§1408. Venue of cases under title 11**
>
> Except as provided in section 1410 of this title, [governing venue of cases ancillary to foreign proceedings] a case under title 11 may be commenced in the district court for the district - -
>
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

§1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending. . . . . .

Finally, 28 U.S.C. §1412 likewise states:

"[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

Section 1412 is complemented by Bankruptcy Rule 1014, subsection (b) of which also provides in relevant part:

If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed . . . .

The phrase "interest of justice" is not defined in §1404, §1412 or Rule 1014(b) and indeed courts have noted that it is "an elusive term not easily amenable to definition." *In the Matter of Emerson Radio Corp.*, 173 B.R. 490, 494-495 (D.N.J. 1994), aff'd, 52 F.3d 50 (3rd Cir. 1995) quoting *In re Pinehaven Assocs.*, 132 B.R. 982, 990 (Bankr.E.D.N.Y. 1991). In any event, a presumption had developed that civil proceedings should be tried in the "home" court, namely the court where the bankruptcy case itself is pending. *Bank of America v. Nickele*, 1998 WL 181827 (E.D.Pa. 1998) at *5. Of course, the burden is on the party seeking to transfer venue to show by a preponderance of the evidence that venue is not proper or that transfer is warranted because it would be in the interest of justice and for the convenience of the parties. *In re Peachtree Lane Associates, Ltd.*, 188 B.R. 815, 830 (N.D. Ill. 1995); *In re Pan Am Corporation*, 177 B.R. 1014, 1018 (S.D. Fla. 1995), both citing *In re Manville Forest Products Corp.*, 896 F.2d 138 (2nd Cir. 1990). Absent such a showing, the court will not disturb the choice of forum made by plaintiff, as it should be accorded great deference. *In re Pan Am*, 177 B.R. at 1018. *See Also: In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989). Although the decision to transfer venue of a case is ultimately committed to the discretion of the court, the following factors may be considered in applying the twin tests of convenience of the parties and the interest of justice:

1. Relative ease of access to sources of proof.

2. Availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining those witnesses' attendance.

3. Enforceability of a judgment if one is obtained.

4. Relative advantages and obstacles to fair trial.

5. Local interest in having local controversies decided at home.

6. Trial in the state the law of which will govern the action.

7. The proximity of the debtor and creditors of every kind to the court.

8. The location of the assets.

9. The economic administration of the estate and the economic necessity for ancillary administration if liquidation should result.

In re Pan Am, supra, citing *In re Global Underwriting Management, Inc.*, 147 B.R. 601 (Bankr. S.D.Fla. 1992); *Bank of America v. Nickele, Supra.; In re Midland Associates,* 121 B.R. 459 (Bankr. E.D.Pa. 1990).

In application of all of the preceding principles, we note that the claims being pressed by the plaintiff here, who is the debtor in the bankruptcy proceedings, arise out of both pre- and post-bankruptcy petition conduct in that Count One seeks damages for GM and GMAC's alleged violation of the automatic stay, while Counts Two through Seven are premised upon defendants' alleged breach of contract, breach of the duty of good faith and fair dealing, tortious interference, conversion of the franchise, etc., which activities are averred to have taken place prior to the filing of the Chapter 11 peti

tion. From this, we conclude that while the first count of the amended complaint is a core proceeding which also arises in a case under title 11 (given that this claim would not have arisen had it not been for the bankruptcy case), the remaining counts are non-core, but are related to the bankruptcy action. This is because any judgment inuring to the benefit of the debtor-plaintiff could conceivably affect the bankruptcy estate and the proceeds available for distribution to Krystal's creditors. *See, Bank of America v. Nickele, supra; In re Nutri System, Inc.*, 159 B.R. 725 (E.D. Pa. 1993).

Having so found, we must next determine the appropriateness of transfer of this matter to the Middle District, where the bankruptcy proceedings are pending. As the plaintiff's own pleadings reflect, it has premised venue in this district on its distribution of advertising, customer solicitation and attendance and participation in GM-sponsored automobile auctions in Berks and Lancaster Counties, on its attendance at sales and corporate meetings in this district and its dealer-trades with other GM dealers located in this district. Plaintiff acknowledges that its place of business and a fortiori, its witnesses and business records are located in the Middle District and it cannot be disputed that Defendants' Michigan headquarters are closer to the Middle District Courthouse in Harrisburg that to the location of this Courthouse in Philadelphia. As a general proposition, where the plaintiff chooses a forum which is neither his home nor the situs where any of the operative facts of the underlying action is based, his forum selection is entitled to less weight. *Eagle Traffic Control, Inc. v. James Julian, Inc.*, 933 F.Supp. 1251, 1259 (E.D.Pa. 1996); *Schmidt v. Leader Dogs for the Blind,*

Inc., 544 F.Supp. 42, 47 (E.D.Pa. 1982). That clearly being the case here and all of the other factors being equal, we can make no other finding but that transfer of this matter to the Middle District would clearly be in the interests of justice and more convenient for the parties.

Thus, inasmuch as transfer is warranted, it shall be accomplished in accordance with the attached Order.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Krystal Cadillac-Oldsmobile-GMC Truck, Inc.	: Civil Action
vs.	: No. 98-CV-5119
General Motors Corporation and General Motors Acceptance Corp.	:

ORDER

AND NOW, this day of March, 1999, upon consideration of Defendants' Motions to Transfer and to Dismiss the Plaintiff's Amended Complaint, it is hereby ORDERED that the Motion to Transfer is GRANTED for the reasons set forth in the preceding Memorandum Opinion and the Clerk of Court is DIRECTED to transfer this case, including Defendants' Motion to Dismiss the Plaintiff's Amended Complaint, to the United States District Court for the Middle District of Pennsylvania.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

APPENDIX G – OPINION OF THE COURT, FILED APRIL 23, 1998

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

Nos. 97-7117 and 97-7118

IN RE: KRYSTAL CADILLAC OLDSMOBILE GMC TRUCK, INC.,

Debtor

KRYSTAL CADILLAC OLDSMOBILE GMC TRUCK, INC.; LAWRENCE V. YOUNG

v.

GENERAL MOTORS CORPORATION

Krystal Cadillac Oldsmobile
GMC Truck, Inc.,
Appellant in No. 97-7117

IN RE: KRYSTAL CADILLAC OLDSMOBILE GMC TRUCK, INC.,

Debtor

KRYSTAL CADILLAC OLDSMOBILE GMC TRUCK, INC.; LAWRENCE V. YOUNG

v.

GENERAL MOTORS CORPORATION

Lawrence V. Young,
Appellant in No. 97-7118

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 96-cv-01614) (Filed April 23, 1998)
Argued
January 28, 1998
Before: MANSMANN, COWEN and ALITO, Circuit Judges

William C. Cramer, Esquire
Kathleen W. Cramer, Esquire (ARGUED)
Suite 414
Chambersburg Trust Building
Chambersburg, PA 17201

COUNSEL FOR APPELLANT KRYSTAL CADILLAC
OLDSMOBILE GMC TRUCK, INC., in No. 97-7117

Lawrence V. Young, Esquire
Sara A. Austin, Esquire (ARGUED)
Countess, Gilbert & Andrews
29 North Duke Street York, PA 17401

COUNSEL FOR APPELLANT LAWRENCE V. YOUNG
In No. 97-7118

James A. Mollica, Jr., Esquire
Mollica & Murray
450 Trimont Plaza
1305 Grandview Avenue
Pittsburgh, PA 15211

Of Counsel:

Carol H. Lesnek-Cooper, Esquire
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, MI 48232

COUNSEL FOR APPELLEE GENERAL MOTORS CORP.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal involving bankruptcy law, we are asked to decide whether a franchise agreement involving a vehicle dealership had been terminated prior to the filing of the bankruptcy petition. Because we find that the franchise agreement was still in effect when the petition was filed, it follows a fortiori that the vehicle franchise was an asset of the bankruptcy estate. We further find that the post-petition adjudications by the state administrative board and the Pennsylvania Commonwealth Court, effectively ordering the termination of the franchise agreement, were made in violation of the automatic stay provision of 11 U.S.C. § 362(a)(3) and, thus, were not binding on the bankruptcy court. Accordingly, we will reverse the order of the district court affirming the order of the bankruptcy court.

I.

The resolution of the dispute before us turns, in large part, on certain events which occurred prior to the commencement of the bankruptcy proceeding. We reiterate the pertinent facts here. Krystal Cadillac-Oldsmobile-GMC Truck, Inc. ("Krystal Cadillac" or the "Debtor"), a licensed vehicle dealer in the Commonwealth of Pennsylvania, owned and operated a GMC dealership in Gettysburg, Pennsylvania. General Motors Corporation is a licensed vehicle manufacturer in the Commonwealth of Pennsylvania and the appellee in this consolidated appeal.

Krystal Cadillac operated the GMC dealership pursuant to the General Motors Corporation (Oldsmobile Division) Dealer Sales and Service Agreement, which went into effect on November 1, 1990. This franchise agreement was to remain in effect until October 31, 1995, unless terminated earlier and, as long as the dealer fulfilled its obligations under the franchise agreement, it was assured the opportunity to enter into a new dealer agreement at the expiration date.

In October of 1991, General Motors Acceptance Corporation withdrew its line of credit financing. Consequently, Krystal Cadillac found itself lacking the necessary financing to purchase new GM vehicles. To no avail, it made numerous attempts to obtain alternative financing. On March 6, 1992, GM notified Krystal Cadillac that is was in breach of the franchise agreement for failing to maintain a line of credit and for failing to purchase new vehicles. Based on the continued breach, GM gave notice on May 10, 1993 that the franchise would terminate in sixty days, that is, on July

13, 1993. At Krystal Cadillac's request, GM extended the termination date to August 12, 1993.

On August 11, 1993, the day before the franchise agreement would have expired, Krystal Cadillac filed an appeal with the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons (the "Vehicle Board"), requesting a hearing on the merits of the termination. Approximately one year later, on August 2, 1994, the Vehicle Board conducted a hearing to review the propriety of GM's notice of termination. Before the Vehicle Board rendered its determination, Krystal Cadillac filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on September 8, 1994. Thereafter, on September 27, 1994, the Vehicle Board entered an Order and Decision allowing GM to terminate the franchise agreement. Subsequently, Krystal Cadillac appealed the order of the Vehicle Board to the Pennsylvania Commonwealth Court, which affirmed the Vehicle Board's decision on November 6, 1995. The Pennsylvania Supreme Court denied Krystal Cadillac's petition for allowance of appeal. *State Bd. of Vehicle Mfrs. v. Krystal Cadillac-Oldsmobile-GMC Truck, Inc.*, 676 A.2d 1203 (Pa. 1996).

While this appeal was pending before the Pennsylvania Commonwealth Court, the bankruptcy court appointed Lawrence V. Young as the Chapter 11 Trustee. The Trustee, in turn, filed a motion to sell the Debtor's assets, including the GM franchise, free and clear of liens and encumbrances. GM filed an objection to the Trustee's motion to sell, contending that the franchise agreement had been lawfully terminated and was not saleable or assignable. The Debtor also objected to the Trustee's motion to sell on the basis that it

intended to file a reorganization plan. On June 15, 1995, the bankruptcy court conducted a hearing on the proposed sale, at which time the court denied the Trustee's motion to sell. On that same date, the Debtor filed a Plan of Reorganization with the bankruptcy court, which provided for the sale of the GM franchise as a means to pay creditors. GM filed an objection to the Plan on July 10, 1995, arguing that since the franchise had been validly terminated in the state proceedings, the franchise was not an asset of the bankruptcy estate available for sale. The Debtor filed an amended reorganization plan on October 24, 1995, to which GM lodged the same objection.

On December 27, 1995, the bankruptcy court entered an order which required the Debtor to file, on or before February 2, 1996, a motion to assume and assign the General Motors franchise and to provide to the Trustee with certain documentation to support such motion, including an unredacted copy of the agreement of sale between the Debtor and any potential purchaser, a copy of the transfer application, evidence to support the potential purchaser's financial abilities, and proof of the Debtor's financial ability to consummate its Plan of Reorganization. In its attempt to comply with the court's December 27th order, the Debtor filed a timely motion to assume and assign the GMC dealership franchise, with documentation of its financial position vis-a-vis the Plan of Reorganization. On March 14, 1996, the Trustee filed a certification with the bankruptcy court, indicating that the Debtor had failed to comply with the terms of the court's December 27, 1995 order, and requesting that the case be converted to a Chapter 7 proceeding.

The bankruptcy court held a hearing on April 1, 1996, regarding the Debtor's compliance with the December 27th order and to consider the merits of the Debtor's motion to assume and assign the franchise. Subsequently, on April 15, 1996, the bankruptcy court entered an order denying the Debtor's motion to assume and assign the franchise. The court reasoned that the decisions rendered in the state proceedings regarding the franchise termination precluded the bankruptcy court from authorizing a sale of the franchise. Both the Debtor and the Trustee filed motions for reconsideration of the bankruptcy court's April 15, 1996, order. In addition, the Trustee filed a motion to assume and to sell the franchise agreement to a qualified buyer for the price of Five Hundred Thousand Dollars ($500,000), which GM opposed.

On July 26, 1996, the bankruptcy court entered an order denying the motions for reconsideration and the Trustee's motion to sell the franchise agreement. The court held that the appeals to the Vehicle Board and to the Pennsylvania Commonwealth Court clearly were filed by the Debtor and hence constituted an action by the Debtor, not against the Debtor. Since the automatic stay provisions of the Bankruptcy Code applied only to actions against the Debtor, they did not apply to the state proceedings. The court therefore concluded that the final termination of the franchise agreement occurred by operation of law as a result of the Vehicle Board's determination that GM had properly effected a termination prior to the filing of the bankruptcy petition. Based upon considerations of comity and finality, the bankruptcy court held that the findings of the Vehicle Board regarding the valid termination of the franchise agreement precluded it

from ruling on the Debtor's ability to assume the franchise agreement since it is clear under section 365 of the Bankruptcy Code, 11 U.S.C. § 365, that a debtor cannot assume a validly terminated contract.

The Debtor and the Trustee appealed the bankruptcy court's July 26, 1996, order to the district court on August 5, 1996. The district court affirmed the order of the bankruptcy court on February 3, 1997, holding that the proceeding before the Vehicle Board did not fall within the scope of the automatic stay provided by 11 U.S.C. § 362 and, therefore, the Vehicle Board's order allowing GM to terminate the franchise agreement was valid and the termination was effective. Accordingly, the district court held the franchise agreement was not an asset of the bankruptcy estate. The Debtor and the Trustee filed timely but separate appeals, which we consolidated for purposes of briefing and disposition.

The bankruptcy court exercised its jurisdiction over this matter pursuant to 28 U.S.C. § 157(b). The district court had jurisdiction to review the bankruptcy court's order pursuant to 28 U.S.C. § 158(a). Our appellate jurisdiction over the district court's order rests upon 28 U.S.C. §§ 158(d) and 1291. In undertaking our review, we stand in the shoes of the district court, applying a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994) (citations omitted); In re Brown, 951 F.2d 564, 567 (3d Cir. 1991).

II.

The outcome of this appeal hinges on whether the franchise agreement should have been included as an asset of the bankruptcy estate. The filing of a voluntary petition for relief in bankruptcy pursuant to 11 U.S.C. § 301 creates an estate in bankruptcy. 11 U.S.C. § 541(a). Generally, the property of an estate in bankruptcy is comprised of all legal or equitable interests of the debtor in property on the date of commencement of the bankruptcy proceeding. 11 U.S.C. § 541(a)(1). If, in fact, the franchise agreement was still in force on the date Krystal Cadillac filed its bankruptcy petition, the franchise agreement, by statute, became an asset of the bankruptcy estate. In order to determine whether the franchise agreement was still in effect on August 11, 1993, the date Krystal Cadillac initiated this bankruptcy proceeding, we look to the express language of the agreement, as well as to the Pennsylvania Board of Vehicles Act, Pa. Stat. Ann., tit. 63, § 818.1 et seq. (West 1996), governing transactions between vehicle manufacturers, dealers and salespersons. We turn first to the franchise agreement.

In October 1990, the Debtor and GM executed the Oldsmobile Division Dealer Sales and Service Agreement ("Oldsmobile Agreement"), which went into effect on November 1, 1990. Paragraph eleven sets forth the term of the franchise agreement as follows:

> This Agreement shall expire on October 31,1995, or ninety days after the death or in capacity of a Dealer Operator or Dealer Owner, whichever occurs first, unless earlier terminated. Dealer is as

> sured the opportunity to enter into a new Dealer Agreement with Oldsmobile at the expiration date if Oldsmobile determines Dealer has fulfilled its obligations under this Agreement.

The Oldsmobile Agreement further provided, in Paragraph Thirteen, for the incorporation of GM's Standard Provisions, Dealer Sales and Service Agreement (GMMS 1013) ("Standard Provisions"), as part of the franchise agreement. Article 13 of the Standard Provisions addresses breaches and the remedy procedures. Where the breach has gone uncorrected, Article 13.1.13 provides:

> If, however, Dealer's response does not demonstrate that the breach has been corrected, or explain the circumstances to [GM's] satisfaction, termination is warranted and [GM] may terminate this Agreement upon written notice to Dealer. Termination will be effective 60 days following Dealer's receipt of the notice.

Article 13.2, dealing with failure of performance by the dealer, provides that the dealer be given no less than six months to correct the failure. If the dealer does not correct the failure within the time allotted, Article 13.2 provides that GM may terminate the franchise agreement by giving the dealer ninety days advance written notice.

Our inquiry does not end with an examination of the terms of the franchise agreement, however, since the agreement between the Debtor and GM is governed by the Pennsylvania Board of Vehicles Act, Pa. Stat. Ann., tit. 63, § 818.1 et seq. (West 1996 & 1997 Supp.). The Act provides for the ap

pointment of a Board of Vehicle Manufacturers, Dealers and Salespersons, which is empowered to regulate the licensing of vehicle salespersons, dealers and manufacturers, and "to adopt, promulgate and enforce such rules and regulations . . . as are deemed necessary and proper to effectuate the provisions of [the Act] . . .", among other things. Id. §§ 818.4(1), (9). Under the Act as amended in 1996, section 818.13 sets forth the provisions governing termination of franchises. In particular, the Act states that any manufacturer who terminates or fails to renew the franchise of any vehicle dealer "unfairly, without due regard to the equities of said dealer and without just cause," has violated the Act. Id. § 818.13(a). Section 818.13(c) requires the manufacturer to give the dealer a minimum of sixty days advance notice of the termination or failure to renew the franchise agreement, although subsection (c) allows a shorter notice period in certain circumstances not present here. Id. § 818.13(c). Of particular relevance to this case is the subsection on appeals:

> At any time before the effective date of such termination or failure to renew, the dealer or distributor may appeal to the board for a hearing on the merits, and following due notice to all parties concerned, such hearing shall be promptly held. No such termination or failure to renew shall become effective until final determination of the issue by the board.

Id. § 818.13(d) (emphasis added). Finally, in the event the dealer appeals the termination or failure to renew the franchise, section 818.13(e) provides that the manufacturer re

tains the burden of proving that just cause existed for such termination or failure to renew. Id. § 818.13(e).

Reading the franchise agreement and the Act together, as we must, we conclude that the franchise agreement was not terminated, but rather, was in force on the date the Debtor filed the petition in bankruptcy. The Act makes clear that once a dealer has appealed the notice of termination, that termination shall not become effective until the Vehicle Board issues its decision. Indeed, counsel for GM conceded at oral argument that Krystal Cadillac retained a viable legal interest in the GM franchise at the time Krystal Cadillac filed a notice of appeal with the Vehicle Board. Moreover, the Vehicle Board had not rendered its decision as of the date of the bankruptcy filing on August 11, 1993. Accordingly, we find that termination of the franchise agreement had not been effectuated on August 11, 1993, and, therefore, that the franchise became an asset of the bankruptcy estate on that date.

III.

We further conclude that the subsequent determinations by the Vehicle Board and the Pennsylvania Commonwealth Court, effectively ordering the termination of the franchise agreement, were made in violation of the automatic stay provisions of 11 U.S.C. § 362(a) and, thus, were not binding on the bankruptcy court. Section 362(a) provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . .operates as a stay, applicable to all entities, of--

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. §§ 362(a)(1), (3). Subsection (b) of section 362 enumerates specific exceptions to the automatic stay provisions, none of which applies here. 11 U.S.C. § 362(b). The legislative history to section 362 and our jurisprudence leave no doubt that the scope of the automatic stay is broad. In re Atlantic Bus. and Community Corp., 901 F.2d 325, 327 (3d Cir. 1990); Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982). Explaining the purpose behind section 362, Congress has stated:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization

> plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296. The broad reach of the automatic stay is further evidenced in the term, "property of the estate," as defined in 11 U.S.C. § 541(a).

The Debtor maintains that the termination of the franchise is an act which resulted in GM taking possession of an asset of the bankruptcy estate and, therefore, was subject to the automatic stay provision in section 362(a)(3). We agree with the Debtor that section 362(a)(3) applies to the facts before us. GM's actions before the bankruptcy court, i.e., objecting to the Trustee's Motion to Sell the Debtor's Assets and the Motion to Assume and Assign as well as to the Debtor's Plan of Reorganization, on the basis that

(1) the franchise agreement had been terminated and, thus, was not the Debtor's asset and

(2) the state court determination to that effect was binding on the bankruptcy court, constituted acts to take possession or control of property of the bankruptcy estate.

We find support in In re Atlantic Bus. and Community Corp., 901 F.2d 325 (3d Cir. 1990). There we considered whether the debtor's possession of a tenancy at sufferance in a radio station and transmitter created a property interest as defined under section 541 and, as such, was protected by the automatic stay provision in section 362(a)(3). Id. at 328. Informed by precedent in our sister circuits, In re 48th St. Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987), we concluded that a possessory interest in real property fell within the purview of the bankruptcy estate under section 541 and, therefore, was protected by the automatic stay provisions of section 362. 901 F.2d at 328. Thus we held the landlord's acts to evict the debtor and dispossess it of its tenancy interest violated the automatic stay provision of section 362(a)(3). Id.

Like the landlord in Atlantic, GM undertook to dispossess the bankruptcy estate of one of its assets. The fact that Krystal Cadillac actually filed the notice of appeal to the Vehicle Board does not alter this result. What is dispositive here are the acts taken by GM after the bankruptcy petition was filed, after having learned that the Debtor intended to assign its interest in the GMC franchise as part of its reorganization plan. We can come to no other conclusion than that GM's actions before the Vehicle Board, the Pennsylvania Commonwealth Court, and the bankruptcy court were taken to obtain possession of the franchise agreement, which we find to be an asset of the bankruptcy estate. Accordingly, GM's acts to enforce the state court's termination of the franchise agreement and to obtain possession of the GMC franchise violated the automatic stay provision of section 362(a)(3).

IV.

In sum, we find that Krystal Cadillac's property interest in a viable GMC franchise is an asset of the bankruptcy estate and that the Trustee is entitled to cure any defects, and to assume and assign the franchise for the benefit of all of the Debtor's creditors. Accordingly, we will reverse the judgment of the district court affirming the order of the bankruptcy court.

APPENDIX H –FIRST AMENDED COMPLAINT-CIVIL ACTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Krystal Cadillac-Oldsmobile-GMC Truck, Inc 1510 York Road Gettysburg, Pennsylvania 17325	: Civil Action – Law
v.	:
General Motors Corporation General Motors Building Detroit, Michigan 48202 and General Motors Acceptance Corporation 3044 West Grand Blvd. Detroit, Michigan 48202	: 98-CV-5119

FIRST AMENDED COMPLAINT – CIVIL ACTION

JURISDICTION AND VENUE

1. Plaintiff is Krystal Cadillac-Oldsmobile-GMC Truck, Inc. (hereinafter "Krystal Cadillac"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in the Commonwealth of Pennsylvania at the address set forth above.

2. Plaintiff, Krystal Cadillac, is a citizen of the Commonwealth of Pennsylvania by virtue of its incorporation in Pennsylvania and its maintenance of its principal place of business is Pennsylvania.

3. At all material time, Plaintiff, Krystal Cadillac, has operated a General Motors dealership in Gettysburg, Pennsylvania. At material times, Krystal Cadillac has regularly conducted business within the Eastern District of Pennsylvania by dissemination of written advertisements and customer solicitations throughout various counties in said district, including but not limited to, the County of Philadelphia; by attending sales and other corporate meetings pertinent to its business and status as a General Motors franchisee at locations within the Eastern District, including but not limited to, the City of Lancaster, Pennsylvania; Wayne, Pennsylvania; and other locations in and around the City and County of Philadelphia; by conduct of dealer vehicle trades on a regular basis with GM dealers at various locations within the Eastern District, including but not limited to, the counties of Lancaster and Berks, and other locations in said judicial district in or around the County of Philadelphia; and by its regular attendance at and purchase of vehicles at GM-sponsored automobile auctions in Manheim, Lancaster County Pennsylvania.

4. Defendant, General Motors Corporation (hereinafter "General Motors"), is a corporation organized and existing under the laws of the State of Delaware. At all material times, the Defendant, General Motors, has, further, maintained its principal place of business in the State of Michigan. The Defendant, General Motors Corporation,

is a citizen of the State of Delaware, or, alternatively, is a citizen of the State of Michigan.

5 .Defendant, General Motors Acceptance Corporation ("GMAC"), is a corporation which, is upon information and belief of the Plaintiff, organized and existing under the laws of the State of New York. At all material times, upon information and belief of the Plaintiff, the Defendant, GMAC, has maintained a principal place of business in the State of Michigan at the address above set forth.

6. At all material times, the Defendant, GMAC, is and has been, upon information and belief of the Plaintiff, a wholly-owned subsidiary of the Defendant, General Motors.

7. At all material times, the Defendant, General Motors, has done business within the Commonwealth of Pennsylvania by virtue of various acts undertaken within the said Commonwealth for the economic gain of General Motors, including but not limited to, the sale and shipment of motor vehicles manufactured by General Motors into and through the Commonwealth of Pennsylvania, and the maintenance of contractual relationships with various retail automobile dealers in the said Commonwealth, including but not limited to, the Plaintiff herein.

8. Defendant, General Motors, is an automobile manufacturer within the meaning of 15 U.S.C.A. §1221(a), and 63 P.S. 818.2.

9. Defendant, GMAC, is statutorily defined "automobile manufacturer" within the meaning of 15 U.S.C.A.

§1221(a), as the Defendant, GMAC, is, at all material times, a corporation which has acted for and has been under the control of the Defendant, General Motors, in connection with the distribution of automotive vehicles.

10. At all material times, the Defendant, GMAC, has done business within the Commonwealth of Pennsylvania by virtue of various acts undertaken within the said Commonwealth for the economic gain of GMAC, including but not limited to, the financing of motor vehicles, at both the wholesale and retail levels, which vehicles were manufactured by General Motors, and which motor vehicles were shipped into and through the Commonwealth of Pennsylvania. The Defendant, GMAC, has, further, done business, at all material times, within the Commonwealth of Pennsylvania by virtue of its maintenance of contractual relationships with various retail automobile dealers of GM-manufactured products in the said commonwealth, including but not limited to, the Plaintiff herein.

11. Plaintiff, Krystal Cadillac, is an automobile dealer within the meaning of 15 U.S.C.A. §1221(c), and 63 P.S. §818, *et seq*

12. This suit is based, in part, upon the existence of a General Motors Dealership Franchise Agreement between Plaintiff and the Defendant, General Motors, within the meaning 15 U.S.C.A. §1221(b), and the Pennsylvania Board of Vehicle Act, 63 P.S. 181, *et seq.*

13. The amount in controversy, exclusive of interest and costs, exceeds the sum of seventy-five thousand dollars ($75,000.00).

14. Jurisdiction of this Court if invoked pursuant to 28 U.S.C.A §1332, as there is diversity of citizenship between the parties, and as the amount in controversy exceeds seventy-five thousand dollars ($75,000.00), exclusive of interest and costs.

15. Jurisdiction of the Court is invoked pursuant to 28 U.S.C.A. §1331, as the claims of Plaintiff arise under the laws of the United States, to wit, the Bankruptcy Code, 11 U.S.C.A. §362(h), and the Sherman Antitrust Act, 15 U.S.C.A. 1 et seq.

16. Jurisdiction is further invoked under 15 U.S.C.A. §1221, *et seq.*

17. Jurisdiction is further invoked under the doctrines of pendent jurisdiction and ancillary jurisdiction.

18. Venue is proper in the Eastern District of Pennsylvania under 28 U.S.C.A. 1391 as the Defendants General Motors Corporation and GMAC have each transacted business in said District, and as each Defendant resides in said District within the meaning of 28 U.S.C.A. 1391(c), each being subject to personal jurisdiction in the Eastern District of Pennsylvania as of the time of commencement of this action.

FACTUAL BACKGROUND

19. At all material times, the Plaintiff is and has been engaged in the business of a new and used car dealership in Gettysburg, Pennsylvania. Plaintiff, Krystal Cadillac, is and has been a General Motors franchise/dealer pursuant to a written Dealer Franchise Agreement between General Motors and Plaintiff, a copy of which is attached as Exhibit "A" and entitled "General Motors Corporation Dealer Sales and Service Agreement".

20. Defendant, General Motors, is and has been at all material times a licensed vehicle manufacturer doing business in the Commonwealth of Pennsylvania.

21. On October 1, 1987, Plaintiff, Krystal Cadillac, assumed control over the automotive dealership business know as Lash Cadillac, Inc., which operated under a General Motors franchise agreement at Plaintiff's present location in Gettysburg, Pennsylvania.

22. Between June and August of 1988, Krystal Cadillac consummated transfers of the existing (Lash Cadillac, Inc.) General Motors franchise dealership, as referred to in paragraph 21, herein, by executing Dealer Franchise Agreements with Oldsmobile Division, Cadillac Motor Car Division, and GMC Truck and Coach Division of General Motors Corporation, as required by General Motors for Plaintiff's assumption of the existing Gettysburg franchise.

23. On or about November 1, 1990, Plaintiff and General Motors executed a Dealership Franchise renewal Agreement pursuant to which Plaintiff continued to market

and sell General Motors automobiles at the Gettysburg location. A true and correct copy of this dealership franchise agreement is attached hereto as Exhibit "A" and incorporated herein.

24. Exhibit "A", Dealership Franchise Agreement, provided, by its terms, that it was to remain in effect until October 31, 1995, and indefinitely thereafter, so long as Plaintiff fulfills its obligations under the said agreement. Pursuant to the express terms of the Dealer Franchise Agreement and the law, Plaintiff was assured, *inter alia,* of the right to renew the said agreement on an indefinite basis.

25. Plaintiff is entitled, under controlling federal and state law (*see*, 15 U.S.C.A §1221(a), and 63 P.S. §818, *et seq.*) to the right to renew the Dealer Franchise Agreement (Exhibit "A").

26. At all material times, good, lawful and substantial consideration existed to support the acquisition and continuation of the Dealer Franchise contractual agreement, between Plaintiff and General Motors, which arrangement has continued and continues in existence through and including the present.

27. In or about October, 1991, GMAC unilaterally terminated a line of credit which Krystal Cadillac had relied upon since assuming the Dealer Franchise for the purpose of purchasing vehicles from General Motors.

28. The withdrawal of the line of credit by GMAC was without jurisdiction. Plaintiff was, at all material times, a

credit-worthy dealer, fully capable of meeting its obligations under its then prevailing financing agreement(s) with GMAC.

29. The withdrawal by GMAC of the aforementioned line of credit denied Plaintiff the financial means to purchase a floor plan of new General Motors vehicles.

30. The unilateral withdrawal of said line of credit placed a stigma on Plaintiff and Plaintiff attempted to secure a substitute line of credit, as potential lenders, when they learned of GMAC's cancellation of Plaintiff's line of credit as a GM franchise, regarded Plaintiff's creditworthiness and business stability with suspicion. In fact, Plaintiff was creditworthy and reliable.

31. While Plaintiff was attempting to secure a substitute line of credit, General Motors notified Plaintiff, by letter dated March 6, 1992, and actually delivered several weeks thereafter, that General Motors considered Plaintiff to have breached the aforementioned Dealer Franchise Agreement solely because Plaintiff failed to maintain a line of credit to purchase new General Motors vehicles.

32. The purported cancellation of the dealer franchise agreement further impaired Plaintiff's ability to secure substitute financing, as prospective lenders were reluctant to do business with Plaintiff based on their perception, created by GM's conduct, that Plaintiff's GM franchise, while still a ongoing concern, was either cancelled or was on the verge of cancellation by the franchiser, GM

33. Based upon the alleged breach of the Dealer Franchise Agreement as hereinbefore described, General Motors, on May 10, 1993, notified Plaintiff that the Dealer Franchise would terminate in sixty (60) days, or on July 13, 1993. This unilaterally declared termination date was later extended to August 12, 1993.

34. On August 11, 1993, Plaintiff filed an appeal from General Motors' purported noticed of termination of the Dealer Franchise Agreement with the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons (hereinafter referred to as the "Vehicle Board"), under the Pennsylvania Board of Vehicles Act, 63 P.S. §818.1, *et seq.*

35. General Motors knew or should have known that under both controlling statutory law and the express terms of the Dealer Franchise Agreement, the Dealer Franchise continued in full force and effect until a final adjudication of the issues.

36. Over Plaintiff's protest and request for a continuance, the Vehicle Board held a hearing on August 2, 1994, to review the effect of General Motors' purported notice of termination.

37. On September 8, 1994, before the Vehicle Board rendered any decision, Krystal Cadillac, filed a Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Middle District of Pennsylvania.

38. Plaintiffs' filing of a Petition for Relief under the Bankruptcy Code automatically stayed all action, including

the rendering of a decision by the Vehicle Board, to take possession or terminate the Dealer Franchise.

39. General Motors had actual knowledge of the Chapter 11 filing by Krystal Cadillac on or about the date the petition was filed.

40. On September 27, 1994, the Vehicle Board entered an Order and Decision allowing General Motors to terminate the Dealer Franchise Agreement held by Plaintiff. The Vehicle Board Order was ultimately determined by the United States Court of Appeals for the Third Circuit to have been null and void *ab initio. See,* the decision of the United States Court of Appeals for the Third Circuit in the matter of *In re: Krystal Cadillac-Oldsmobile-GMC Truck, Inc., Debtor, Krystal Cadillac-Oldsmobile-GMC Truck Inc.; Lawrence V. Young v. General Motors Corporation,* by Opinion of the Court filed April 23, 1998 and reported at 142 F.2d 632 (3rd Cir. 1998).

41. On June 15, 1995, Krystal Cadillac filed a Plan of Reorganization with the Bankruptcy Court, which Plan provided for the sale of the General Motors Dealer Franchise as a means to pay existing creditors and to furnish the Debtor, Krystal Cadillac, with operating capital to continue business operations.

42. On July 10, 1995, Defendant, General Motors, filed objections to Krystal Cadillac's Plan of Reorganization alleging that General Motors had validly terminated the dealer franchise and asserting that the franchise was not an asset of the bankruptcy estate.

43. On October 24, 1995, Krystal Cadillac filed an Amended Plan of Reorganization, which also provided for the sale of the General Motors Dealer Franchise as a means to pay existing creditors and to furnish the Debtor, Krystal Cadillac, with operating capital to continue business operations.

44. On November 5, 1995, Defendant General Motors filed Objections to Krystal Cadillac's Amended Plan of Reorganization alleging that General Motors had validly terminated the Dealer Franchise and asserting that the franchise was not an asset of the bankruptcy estate.

45. In or around October, 1995, General Motors publicly announced and acknowledged the existence and implementation of a certain corporate plan known as "Project 2000" whereby GM intentionally set about to cause the elimination of some twenty percent (20%) of its franchise nationwide.

46. In its implementation of Project 2000, GM sought to infringe upon and violate the contractual, common law, and federal and state statutory rights of large numbers of its franchisees, including the Plaintiff.

47. GM's goals and aims, in implementation of Project 2000, included the following:

(a) reduction of its franchisees nationwide by a factor of some twenty percent;

(b) enforcement of newly established and unilateral GM-imposed "dualing" requirements

whereby GM sought to enforce certain new franchisor-favored "dualings" or combinations of GM-manufactured products among its brands, Chevrolet, Pontiac, Oldsmobile, Buick, Cadillac and GMC Trucks, as opposed to various brand combinations then extant in the franchise population;

(c) exertion of economic pressure upon GM franchises to eliminate non-GM franchisees from GM dealership premises and showrooms, in contravention of the contractual right of certain GM franchises or their affiliates to sell and service non-GM automobiles and trucks, and in restraint of free interstate trade, competition and commerce in automobiles and truck generally;

(d) termination of Cadillac franchises located in rural areas in favor of placement of Cadillac sales and service locations in urban and suburban areas, notwithstanding the contractual and other rights of Cadillac franchisees;

(e) elimination of large numbers of stand-alone Oldsmobile franchises, and of certain dual franchises which served as outlets or Oldsmobile cars in dual or combination with other GM brands, where such duals were non-favored by GM, in contravention of contractual and other rights of Oldsmobile franchisees.

48. In or around October, 1995, at dates unknown to Plaintiff, GM budgeted a large sum of money, believed to be at or in excess of $1 billion to implement project 2000.

49. Project 2000, while announced in or around October, 1995, was the subject of management, discussion, and agreement among internal elements of GM at points earlier that October, 1995, at dates and times presently unknown to Plaintiff.

50. Project 2000 included financial incentives for dealers to sell their franchises to GM, to move their franchises to locations more favored by GM, or to change brands among GM's product lines.

51. Project 2000 also included a program whereby GM, acting in concert with Motors Holdings Corporation, planned to obtain control of certain existing GM franchises and to have ownership of same acquired by Motors Holdings.

52. Plaintiff's franchise, combining Cadillac, Oldsmobile, and GMC Trucks on one sales location, was a GM brand combination unilaterally and arbitrarily disfavored by GM under Project 2000, notwithstanding Plaintiff's contractual right to operate said franchise and said brand mix.

53. Plaintiff's location in a rural area, servicing Gettysburg, Pennsylvania and its environs, was a location unilaterally and arbitrarily disfavored by GM for the sale of Cadillac cars, or alternatively, dualed Cadillac and GMC

products, notwithstanding Plaintiff's contractual right to sell and service both Cadillac and GMC products at said location.

54. Plaintiff was an Oldsmobile franchisee, selling and serving Oldsmobile products at its location, which brand GM targeted for franchise location reduction, notwithstanding Plaintiff's contractual right to sell and service both Cadillac and GMC products at the said location.

55. At relevant times, a sister corporation of Plaintiff, Krystal Jeep-Eagle, Inc., operated a Jeep Eagle franchise at the same location with Plaintiff, said sister corporation being a franchisee of Chrysler Corporation. The ownership of Krystal Cadillac and Krystal Jeep Eagle was the same or substantially similar.

56. The sharing by Krystal Cadillac of its sales location, facilities, lot and showroom with Krystal Jeep Eagle, while not violative of any of the provisions of Plaintiff's dealer franchise agreement with GM, was an arrangement disfavored and actively and openly discouraged by GM, which sought to prevent Plaintiff and other GM franchisees situate as Plaintiff from operating automobile franchisee selling non-GM automobiles and trucks, notwithstanding the right of Plaintiff from operating automobile franchisees to engage ins such business activity. This conduct and activity by GM was a violation of its duties under its franchise agreement with Plaintiff, and was also an effort by GM to impose an unreasonable restraint on interstate trade and commerce.

57. On December 27, 1995, the Bankruptcy Court entered an Order gathering leave for Krystal Cadillac to file, on or before February 2, 1996, a Motion to Assume and Assign the General Motors franchise and to provide the Trustee with certain documentation to support such motion.

58. Krystal Cadillac complied with the Bankruptcy Court's December 27, 1995 Order by filing a timely Motion to Assume and Assign its GM dealer franchise and furnishing documentation to support such motion.

59. On April 1, 1996, the Bankruptcy Court held a hearing to consider the merits of Krystal Cadillac's Motion to Assume and Assign the GM dealer franchise. On April 15, 1006, the Bankruptcy Court entered in Order denying Krystal Cadillac's Motion to Assume and Assign the GM dealer franchise. Both Krystal Cadillac and the Bankruptcy Trustee timely filed Motions for Reconsideration of the Bankruptcy Court's April 15, 1996 Order.

60. On April 25, 1996, the Trustee in Bankruptcy filed a Motion to Assume and Assign the General Motors dealer franchise to a qualified buyer for the price of five hundred thousand dollars ($500,000.00).

61. On May 10, 1996, General Motors filed objections to the Trustee's Motion to Assume and Assign the Dealer Franchise alleging that General Motors had validly terminated the Dealer Franchise and asserting that the franchise was not an asset of the bankruptcy estate.

62. On June 25, 1996, the Bankruptcy Court held a hearing on the Trustee's Motion to Assume and Assign the General Motors dealer franchise to qualified buyer for the price of Five Hundred Thousand Dollars ($500,000.00). General Motors appeared at this hearing to object to the Trustee's proposed assumption and assignment of the Dealer Franchise.

63. On July 26, 1996, the Bankruptcy Court entered an Order denying the aforementioned Motions for Reconsideration and the Trustee's Motion to Assume and Assign the Dealer Franchise.

64. On August 5, 1996, Krystal Cadillac and the Trustee in Bankruptcy appealed the Bankruptcy Court's July 26, 1996 Order to the U.S. District Court for the Middle District of Pennsylvania. The District Court affirmed the said Order on February 3, 1997; a timely appeal was filed by both Krystal Cadillac and the Trustee in Bankruptcy to the United States Court of Appeals for the Third Circuit.

65. On April 23, 1998, the United States Court of Appeals for the Third Circuit entered an Opinion and Order which held that the Krystal Cadillac General Motors Dealer Franchise is a viable asset of the bankruptcy, estate has ben an asset since the date of the filing of Krystal Cadillac's petition in bankruptcy, and continues to and continues to be in effect. The Third Circuit Court of Appeals further held that General Motors' various actions to terminate Krystal Cadillac's Dealer Franchise and obtain possession of the franchise violated the automatic stay provisions of §362(a)(3) of the Bankruptcy Code.

66. On October 28, 1997, the Bankruptcy Court entered an Order confirming Krystal Cadillac's First Amended Plan of reorganization (which Plan was filed on October 24, 1995 and incorporated by reference into the Bankruptcy Court's Order of October 28, 1997). Attached hereto as Exhibit "B" and incorporated herein is a true and correct copy of the Order of October 28, 1997.

67. GMAC filed a Proof of Claim in Krystal Cadillac's Chapter 11 case which was resolved by settlement agreement between the parties and payment in full under the First Amended Plan of Reorganization. By operation of law, therefore, GMAC holds no claim for payment against Plaintiff.

68. General Motors elected not to file a Proof of Claim in Krystal Cadillac's Chapter 11 case. Therefore, by operation of law, and further by the express provisions of the Bankruptcy Court's Order of Confirmation of Krystal Cadillac's First Amended Plan of Reorganization, General Motors holds no monetary claim or any other type of claim which could prevent assignment of the Dealer Franchise Agreement or which would be asserted against the Plaintiff.

69. At material times during the pendency of the bankruptcy proceeding, there was a cash purchaser ready, willing, able and qualified to purchase the Krystal Cadillac General Motors Dealer Franchise for the cash price of Five Hundred Thousand Dollars ($500,000.00).

70. In addition to the cash proceeds arising from the sale of the Dealer Franchise, the sale of the franchise would have provided various additional financial benefits to the Plaintiff, including, but not limited to, rental income for lease of the real estate, buildings and equipment, revenue from the sale of parts and other tangible assets, and potential income from consulting and transitional services. Plaintiff believes and therefore avers that General Motors acted knowingly, willfully and intentionally in all of its actions regarding its efforts to unlawfully terminate and take possession of the Krystal Cadillac Dealer Franchise.

71. Plaintiff believes and therefore avers that in all of General Motors' actions regarding its efforts to unlawfully terminate and take possession of the Krystal Cadillac Dealer Franchise, General Motors acted maliciously, wantonly, recklessly and in bad faith.

72. General Motors failed to affirmatively take action as required by law to restore the status quo of the operating dealership Krystal Cadillac and GM under the terms of the Dealer Franchise Agreement as it existed prior to the notice of termination.

COUNT ONE:

KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC. v. GENERAL MOTORS CORPORATION:
ACTION FOR DAMAGES UNDER 11 U.S.C. §362(h)

73. Plaintiff incorporates herein by reference thereto paragraphs 1 through 72 inclusive hereof as though the same were fully set forth a length.

74. At all material times, the Defendant, General Motors, willfully, intentionally, maliciously and in bad faith, violated the automatic stay provisions of §362 of the U.S. Bankruptcy Code, by acting to terminate and obtain possession of the Plaintiff's General Motors Dealer Franchise, which franchise was, at all material times, an asset of the bankruptcy estate.

75. The Third Circuit Court of Appeals specifically found that GM violated the automatic stay provisions of Section 362 of the Bankruptcy Code, holding as follows:

> Like the landlord in Atlantic, GM undertook to dispossess its bankruptcy estate of one of its assets. The fact that Krystal Cadillac actually filed the notice of appeal to the Vehicle Board does not alter this result. What is dispositive here are the acts taken by GM after the bankruptcy petition was filed, after having learned that the Debtor intended to assign its interest in the GMC franchise as part of its reorganization plan. We can come to no other conclusion than that GM's actions before the Vehicle Board, the Pennsylvania Commonwealth Court,

> and the bankruptcy court were taken to obtain possession of the franchise agreement, which we find to be an asset of the bankruptcy estate. Accordingly, GM's acts to enforce the state court's termination of the franchise agreement and to obtain possession of the GMC franchise violated the automatic stay provision of section 362(a)(3). *Cadillac-Oldsmobile-GMC Truck, Inc., Debtor, Krystal Cadillac-Oldsmobile-GMC Truck Inc.; Lawrence V. Young v. General Motors Corporation*, 142 F.2d 632, ____. (3rd Cir. 1998). (footnote omitted).

76. The aforesaid finding and adjudication of the Third Circuit is final and on the merits, having been the subject of an unsuccessful Motion for en banc Reconsideration in said Court by GM. Further, GM has not sought a review of said decision in the United States Supreme Court.

77. GM is bound by the aforesaid judicial findings under the doctrines of *res judicata* and collateral estoppel.

78. As a proximate and direct result of the violations by General Motors of the automatic stay provisions of the Bankruptcy Code as aforesaid, Plaintiff sustained various legal harms and determines, including but not limited to, the following:

(a) loss of profits form operations of the dealership and loss of proceeds from the sale of the Dealer Franchise and other assets;

(b) loss of good will;

(c) accrual of additional and unnecessary counsel fees and expenses in connection with undue prolongation of the bankruptcy reorganization proceedings;

(d) accrual of additional and unnecessary fees and expenses of the Trustee in bankruptcy in connection with undue prolongation of the bankruptcy reorganization proceedings;

(e) loss of Plaintiff's reputation within the business community;

(f) loss of the time value of money in connection with the out-of-pocket expenditures accrued by Plaintiff which, except for General Motors' acts, would have been form the cash flow from the dealership operation or from sale of the dealership asserts;

(g) accrual of additional and unnecessary costs in connection with the said bankruptcy proceeding, including, but not limited to, costs of filing appeals of the Bankruptcy Court decision to United States District Court for the Middle District of Pennsylvania, and to the United States Court of Appeals for the Third Circuit.

79. As a further proximate and direct result of the aforesaid violations of the automatic stay provisions of the Bankruptcy Code, Plaintiff claims punitive damages in an unspecified amount against the Defendant, General Motors, pursuant to §362 (h) of the Bankruptcy Code.

WHEREFORE, Plaintiff does pray for judgment in its favor and against Defendant, General Motors Corporation, for punitive as well as compensatory, actual special pecuniary, and general damages, as well as other damages as authorized by law, in an amount in excess of one hundred thousand dollars ($100,000.00), together with costs of suit, and does bring this action to recover to same.

COUNT TWO:

KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC. v. GENRAL MOTORS CORPORATION-
BREACH OF CONTRACT

80. Plaintiff incorporates herein by reference thereto paragraphs 1 through 79 inclusive hereof as the though same were more fully set forth at length.

81. At all material times, there existed, and presently exists, a contract between the Plaintiff and Defendant, General Motors, as evidenced by the Dealer Franchise Agreement hereinbefore described (Exhibit "A").

82. At all material times, good, substantial and lawful consideration existed to support the said contract, to wit, the mutual performances, compromises and covenants undertaken by General Motors and Plaintiff in connection with said Dealer Franchise Agreement and Plaintiff's substantial investments of capital, time, and efforts.

83. At all material times, the Defendant General Motors had an affirmative duty of good faith and fair dealing with respect to Plaintiff, by virtue of the contractual relationship

existing between Plaintiff and General Motors part of the Defendants, or either of them, in concert with certain other actors and/or entities whose identities are not know to the Plaintiff, constituted unreasonable restraints of trade and/or commerce.

WHEREFORE, Plaintiff does pray for judgment in its favor and against the Defendants, General Motors Corporation and General Motors Acceptance Corporation, for compensatory, punitive and statutory treble damages in an amount in excess of one hundred thousand dollars ($100,000.00).

A TRIAL BY JURY IS HEREBY DEMANDED AS TO ALL CUASES OF ACTION SET FORTH HERIN.

BY:_____

GERARD J. JACKSON, ESQUIRE
Identification No. 24613
1260 Marlkess Road, Suite 2
P.O. Box 1820
Cherry Hill, NJ 0034-0109
(609) 489-8100
Attorney for Plaintiff,
Krystal Cadillac-Oldsmobile-GMC Truck, Inc.

Supreme Court, U.S.
FILED
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No. 03-1305

IN THE

Supreme Court of the United States

KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION and
GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

JON G. HOGUE
Counsel of Record
TIMOTHY MURRAY
MURRAY, HOGUE & LANNIS
3400 Gulf Tower
Pittsburgh, PA 15219
(412) 263-5650

JAMES A. MOLLICA
Blackburn Road
Sewickley, PA 15143

Counsel for Respondents

Of Counsel:

CAROL H. LESNEK-COOPER
GENERAL MOTORS CORPORATION
3031 West Grand Boulevard
Detroit, MI 48232

186897

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court should grant Certiorari where the ruling for which review is sought does not present a conflict with a decision of any other Circuit Court and is entirely consistent with this Court's recent and thorough discussion of the doctrine of judicial estoppel?

2. Whether a court may dismiss a cause of action on argument and briefs alone where the record is undisputed, an evidentiary hearing is unnecessary, and there is no room for a reasonable trier of fact to rule otherwise?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

General Motors Corporation has no parent company and State Street Bank is the only shareholder that owns more than 10% of GM's outstanding shares.

General Motors Acceptance Corporation is a wholly owned subsidiary of General Motors Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Constitutional Provision Involved	1
Statement of the Case	1
A. Proceedings prior to this action	1
B. The instant action	4
Reason for Denying the Petition	5
I. The doctrine of judicial estoppel is uniformly applied since this Court's decision in *New Hampshire v. Maine*.	6
II. The Third Circuit did not misconstrue the law regarding the section 362(h) claim, or misapply a properly stated rule of law to these facts.	9

Contents

Page

III. Krystal's procedural due process rights were not violated merely because the Court decided an issue on briefs and argument without an evidentiary hearing. 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Beem v. McKune, 317 F.3d 1175 (10th Cir. 2003) .. 8

Harker v. Troutman, 253 B.R. 1 (B.A.P. 6th Cir. 2000) 8

In re Krystal Cadillac Oldsmobile GMC Truck, Inc., 142 F.3d 631 (3d Cir. 1998) ..... *passim*

In re Landsdale Family Restaurants, Inc., 977 F.2d 826 (3d Cir. 1992). 11

In Re Schempp Real Estate LLC, 303 B.R. 866 (D. Colo. Bankr. Ct. 2003) 8

In re: Troutman Enterprises, Inc., 286 F.3d 389 (6th Cir. 2002) 8

In re University Medical Center, 973 F.2d 1065 (3d Cir. 1992 9

Segal v. Rochelle, 382 U.S. 375 (1966) 10

State of New Hampshire v. State of Maine, 532 U.S. 742 (2001) 1, 5, 6, 8

Cited Authorities

Page

Statutes:

11 U.S.C. § 362 11

11 U.S.C. § 362(a)(3) 4

11 U.S.C. § 362(h) 9, 10, 11, 12

11 U.S.C. § 1125(b) 5

63 P.S. § 818.13 1

CONSTITUTIONAL PROVISION INVOLVED

Respondents disagree that the U.S. Constitution, Amendment V, is involved in this matter.

STATEMENT OF THE CASE

This unique dispute involves numerous proceedings in both federal and state courts and labyrinthine facts spanning more than a decade, but it raises no issue meriting this Court's review. The Third Circuit properly applied the doctrine of judicial estoppel consistent with this Court's opinion in *State of New Hampshire v. State of Maine*, 532 U.S. 742 (2001) to dismiss Petitioner's claims in this action. The undisputed evidence shows that in the bankruptcy proceeding Petitioner initiated, Petitioner duplicitously concealed the existence of each of the claims in this case and arrogated them to itself in order to profit at the expense of its creditors.

A. Proceedings prior to this action

Petitioner, former Gettysburg General Motors Corporation ("GM") dealer Krystal Cadillac-Oldsmobile-GMC Truck, Inc. ("Krystal"), defaulted on its GM Dealer Agreement obligations in 1991 when it lost its "floor plan" financing, precluding it from purchasing new GM vehicles. (Appendix attached to the Petition ("App.) 5a.) GM subsequently notified Krystal of its intent to terminate Krystal's GM Dealer Agreements because Krystal was a GM dealer in name only. However, on August 11, 1993, the day before termination was to be effective, Krystal filed a protest of the termination notice with the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons ("Vehicle Board"), the state agency charged with regulating the termination of new vehicle dealer franchises. 63 P.S. § 818.13.

Following a hearing before the Vehicle Board, but *before* the Vehicle Board issued its adjudication, on September 8, 1994, Krystal filed a Chapter 11 bankruptcy petition. On September 27, 1994, the Vehicle Board upheld the termination of Krystal's GM Dealer Agreements. Krystal filed an appeal of the Vehicle Board's decision with the Pennsylvania Commonwealth Court, where it argued for the first time that the automatic bankruptcy stay attendant to its Chapter 11 petition prohibited termination of its GM Dealer Agreements.

While the Commonwealth Court appeal was pending, on June 15, 1995, Krystal filed a Chapter 11 Plan of Reorganization in which it provided for the sales of its GM franchises to pay its creditors.[1] In July 1995, GM objected to the Plan on the basis that the Vehicle Board had previously upheld the termination of Krystal's GM Dealer Agreements. (App. 116a; Amended Complaint, ¶42.) Thereafter, on October 24, 1994, Krystal filed an Amended Disclosure Statement that contained the following boilerplate language:

> [T]he status of [Krystal's GM franchise] is not in litigation. General Motors terminated the franchise prior to the commencement of the case and the matter was in litigation at the time the Chapter 11 petition was filed. General Motors nevertheless proceeded with termination and the matter is now on appeal in the [Pennsylvania]

1. We present a correct statement of the facts in recognition of Rule 15(2). Among the misconceptions created by the Petition is Krystal's claim that under its Reorganization Plan, secured and priority creditors were to be paid in full. In fact, such payment was contingent on Krystal selling the GM franchises at some undetermined profit.

> Commonwealth Court. Debtor takes the position, which is vigorously contested by General Motors, that this franchise agreement remains an asset of the case.

(App. 7a.)

Krystal's Amended Disclosure Statement did *not* disclose the existence of any of the seven claims which it asserts in this action, even though Krystal had knowledge of each of them at the time it filed its Disclosures on October 24, 1995. These claims, and the time when they were factually known are:

> *Count I* of the Amended Complaint alleged that GM supposedly committed a willful violation of the automatic bankruptcy stay under 11 U.S.C. § 362(h): but, as shown above, Krystal knew at least in July 1995 that GM sought to enforce the Vehicle Board's termination of the Dealer Agreements in the Bankruptcy Court, thus supposedly violating the automatic stay. (Amended Complaint, ¶42.) (App. 116a.)

> *Counts II through VII* of the Amended Complaint related to the attempted termination of Krystal's GM Dealer Agreements in 1994 and the events leading up to it, each event occurring prior to the Disclosure requirement and, in fact, pre-petition.[2]

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2. Krystal's Appendix to its Petition is misleading since the copy of the Amended Complaint omits 61 paragraphs and five counts of the Amended Complaint, all dealing with pre-petition matters.

Subsequent to Krystal's filing of the Amended Disclosure Statement, on November 6, 1995, the Pennsylvania Commonwealth Court rejected Krystal's attempt to undo the termination of the GM Dealer Agreements when it affirmed the Vehicle Board's decision, holding (because this is the first time Krystal had raised the issue) that the termination of Krystal's GM Dealer Agreements did not violate the automatic bankruptcy stay.

The Bankruptcy Court thereafter denied Krystal's Motion to Assume and Assign Krystal's GM Dealer Agreements and afforded preclusive effect to the Commonwealth Court's decision, including the determination that the automatic bankruptcy stay did not preclude termination of the GM Dealer Agreements. The District Court affirmed, but the Third Circuit, in *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631 (3d Cir. 1998) (*Krystal I*), reversed and held that GM's defense of the determination of the Vehicle Board proceeding (a proceeding initiated by Krystal) was deemed to be an act to take possession of property of the bankruptcy estate (the GM franchises) in violation of the automatic stay provision of 11 U.S.C. § 362(a)(3).

B. The instant action

In 1998, Krystal initiated this action in the District Court for the Eastern District of Pennsylvania despite the absence of any factual or legal nexus of these claims to that forum. On GM's Motion, the action was transferred to the Middle District Court of Pennsylvania, where the bankruptcy had been pending for many years. Following GM's Motion to Dismiss, the Bankruptcy Court dismissed all counts of Krystal's Complaint, and the District Court affirmed, as did the Third Circuit in the decision sought to be reviewed, reported at

337 F.3d 314 (3d Cir. 2003) (*Krystal II*). Each of the courts held that judicial estoppel barred Krsytal's claims since Krystal failed to disclose the existence of any of its alleged claims in its Amended Disclosure Statement filed in the bankruptcy action despite having knowledge of each of them.

In *Krystal II*, The Third Circuit fairly concluded that Krystal's non-disclosures constitute "what appears to be duplicitous conduct. . . ." (App. 24a.) It properly recited the bankruptcy debtor's duty, pursuant to 11 U.S.C. § 1125(b), to provide full and honest disclosure of "all 'property of the estate' including all of the debtor's legal and equitable interests. This includes such contingent assets as any cause of action Krystal may have against GM, and Krystal does not argue to the contrary." (App. 16a.) The debtor's duty of full disclosure, the Third Circuit explained, is one that "'cannot be overstated,'" (App. 19a) or "'overemphasize[d]'" since it is "'the pivotal concept' in reorganization of a Chapter 11 debtor." (App. 17a) (citations omitted). Krystal's "boilerplate" Amended Disclosure Statement, *Krystal II* concluded, "did not specify any of the claims contained in the instant complaint against GM, much less attempt to place any monetary value on them." (App. 15a.)

REASON FOR DENYING THE PETITION

The Third Circuit's holding in Krystal II that the instant claims are barred by the doctrine of judicial estoppel is entirely consistent with this Court's thorough delineation of the factors pertinent to the application of that doctrine in *State of New Hampshire v. State of Maine*, 532 U.S. 742 (2001). Moreover, *Krystal II's* holding does not conflict in any manner with any decision of any Circuit Court. Nor does Krystal otherwise present a compelling reason for review.

I. The doctrine of judicial estoppel is uniformly applied since this Court's decision in *New Hampshire v. Maine.*

Krystal does not suggest, because it cannot, that *Krystal II's* application of the doctrine of judicial estoppel instantly was in any manner inconsistent with this Court's rationale, or that the Third Circuit misapplied any of the factors set forth in *State of New Hampshire*, *supra*. Instead, the Petition contrives to manufacture a reason for reviewing this case by claiming that the various Circuit Courts are applying the doctrine of judicial estoppel chaotically, characterizing it as a "controversial" (Petition at 6) and "ill-defined common law doctrine, without uniform national standards" whose "unrestrained use by the nation's federal court system . . . is a recurring issue worthy of consideration." (Petition at 8.)

Aside from paying lip service to *State of New Hampshire v. State of Maine*, *supra*, a decision in which all Justices joined (except Justice Souter, who recused himself), Krystal's Petition reads is as if that decision had never been written. But that decision's thorough discussion of the doctrine uncovered none of the purported chaos in the Circuit Courts' application of it advanced by Krystal or, for that matter, any other basis to rein in the doctrine's supposed "unrestrained use." This Court recognized that, by necessity, this equitable doctrine cannot be reduced to an inflexible formula, as Krystal apparently advocates, but must be guided by the application of various factors to the particular facts of each case.[3]

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3. This Court explained that

> courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," . . . by

(Cont'd)

Krystal references several purported differences in the manner in which the Circuit Courts supposedly apply the doctrine, but none of these supposed variations have anything to do with *this* case. In fact, with respect to the issue actually raised in this case (as opposed to the *other* purported

(Cont'd)

> "prohibiting parties from deliberately changing positions according to the exigencies of the moment,". . . . Because the rule is intended to prevent "improper use of judicial machinery," . . . judicial estoppel "is an equitable doctrine invoked by a court at its discretion,". . . . Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," . . . Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled,". Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . . and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

Id. at 749-51 (citations omitted).

applications of judicial estoppel Krystal goes out of its way to discuss), Krystal candidly admits that there is no conflict — that a bankruptcy debtor's failure to reference in bankruptcy schedules a potential cause of action "[t]ypically" and "often" will result in dismissal of the cause of action under principles of judicial estoppel. (Petition at 6-7.)[4]

On pages 9 through 11 of the Petition, Krystal parses selective language from various cases, all of which were decided *prior to New Hampshire v. Maine*, *supra*, to make it appear as if the Circuits are in turmoil, applying the doctrine without any standards. In fact, these purported differences are nothing more than the courts applying this well-defined doctrine to the unique facts under review before them. In addition, since all of the cited decisions were decided prior to this Court's clarification of the doctrine in *New Hampshire v. Maine*, *supra* (including a Tenth Circuit decision which is cited for that Circuit's pre- *New* Hampshire "frank rejection" of that doctrine)[5] they are scarcely authority for the proposition that "[t]here is no uniform expression of the judicial estoppel doctrine in the federal court system." (Petition at 9.)

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4. Krystal fails to point out that the lone Bankruptcy Court decision it cites for the proposition that a debtor's failure to disclose an asset in its schedules does not constitute a "position" taken for purposes of judicial estoppel, *Harker v. Troutman*, 253 B.R. 1 (B.A.P. 6th Cir. 2000), was, in fact, vacated. *In re: Troutman Enterprises, Inc.*, 286 F.3d 389 (6th Cir. 2002).

5. *But see, e.g., In Re Schempp Real Estate LLC*, 303 B.R. 866 (D. Colo. Bankr. Ct. 2003), where the court predicted that the Tenth Circuit will now follow this Court's rationale in light of *New Hampshire v. Maine*, *supra*. *See also*, *Beem v. McKune*, 317 F.3d 1175, 1185 (10th Cir. 2003) (Concurring Opinion).

Krystal II is consistent with this Court's careful discussion of the law and is not "in conflict with the decision of another United States court of appeals on the same important matter" to justify review. (Supreme Court Rule 10(a).)[6]

II. The Third Circuit did not misconstrue the law regarding the section 362(h) claim, or misapply a properly stated rule of law to these facts.

The lone reasons specific to this case that Krystal posits to support review are factually and legally incorrect: (1) Krystal alleges that it had no duty to raise the § 362(h) claim in its Amended Disclosure Statement since it did not accrue until after the bankruptcy petition was filed and, thus, was not property of the Chapter 11 bankruptcy estate. (2) Krystal alleges that it could not disclose the § 362(h) claim in the Amended Disclosure Statement since it did not accrue until after Third Circuit's 1998 ruling in *Krystal I* that GM violated the automatic bankruptcy stay; prior to *Krystal I*, Krystal claims, it was the "law of the case" that GM's actions did not violate the automatic stay.

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6. Krystal off-handedly contends that "the tort liability" for violating the automatic stay "was evident, as a matter of fact and law. . . ." (Petition at 7.) In fact, although *Krystal I* found that GM violated the automatic stay, the only court that has ever reached the issue of whether GM committed a "*willful*" violation of the stay, as required under Section 362(h), was the Bankruptcy Court, and it held that it did *not*. (App. 65a-67a.) Indeed, because GM's post-petition conduct was premised on persuasive legal authority, such conduct was not a *willful* violation. *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992).

The assertion that Krystal's § 362(h) claim is not property of the estate was not raised by Krystal prior to the decision in *Krystal II* and is inconsistent with Krystal's stance in the lower courts, which led the Bankruptcy Court to conclude that Krystal "does not appear to contest that the instant causes of action belong to the estate." (App. 55a.)

In any event, this position is patently incorrect. This § 362(h) claim is a core proceeding that would not have arisen had it not been for the bankruptcy case. *See, e.g.*, the authorities discussed at App. 81a-88a. Any purported violation of the automatic stay by GM involved Krystal's GM Dealer Agreements, which were property of the estate, not the bankrupt. Consequently, any alleged violation of the stay involving the GM Dealer Agreements was an injury to the estate, not the bankrupt. Moreover, each of Krystal's seven claims for relief are anchored in activities that occurred pre-petition. A bankrupt's estate is not limited to include those claims that had accrued and were ripe at the time the petition was filed; it also includes those claims that accrue post petition and "are sufficiently rooted in the pre-bankruptcy past." *Segal v. Rochelle*, 382 U.S. 375 (1966). For these reasons, Krystal is unable to furnish this Court any authority to support its position.

As to *when* Krystal's § 362(h) claim accrued, Krystal continues to repeat a legally and factually erroneous assertion: each of the courts that have reviewed this matter, the Third Circuit, the District Court and the Bankruptcy Court, properly rejected the assertion that the § 362(h) claim did not accrue until after the ruling in *Krystal I* in 1998. In fact, at the time Krystal filed its Amended Disclosure Statement on October 24, 1995, Krystal had actual knowledge of the § 362(h) claim (as well as each of its other claims), but in "bad faith" failed

to disclose them. (App. 37a.) This is shown, for example, by Krystal's concession in its Amended Complaint that GM sought to enforce the state court's termination of the Dealer Agreements in the Bankruptcy Court (thus violating the automatic stay) in July, 1995, *prior to Krystal's October 24, 1995* filing of its Amended Disclosure Statement. (Amended Complaint, ¶42) (App. 116a.) (*See also*, App. 37a.) Moreover, in the Pennsylvania Commonwealth Court proceedings, prior to October 24, 1995, Krystal advocated that termination of its GM Dealer Agreements violated the § 362 automatic stay. In short, Krystal clearly could have asserted its § 362(h) claim in its Amended Disclosure Statement as there is no requirement that assertion of a § 362(h) claim need be preceded by a judicial determination that a violation has occurred. Most § 362(h) claims are asserted without any such determinations. *See*, *e.g.*, *In re Landsdale Family Restaurants, Inc.*, 977 F.2d 826 (3d Cir. 1992).

Krystal's contention that it was precluded from raising its § 362(h) claim by virtue of the doctrine of "law of the case" until after *Krystal I* was decided in 1998 is also factually and legally incorrect. At the time Krystal filed its Amended Disclosure Statement on October 24, 1995 (App. 8a), *no* court or agency had yet ruled that GM had not violated the automatic bankruptcy stay. Krystal did not raise this issue before the Vehicle Board, and the Commonwealth Court did not rule on this issue until November 6, 1995 – some two weeks *after* the Amended Disclosure Statement was filed. (App. 7a, 18a.) Thus, contrary to Krystal's position, this was not the "law of the case" on October 24, 1995.

Moreover, Krystal certainly believed it could challenge GM's right to terminate the Dealer Agreements, and did so in every court proceeding at issue over the last ten years.

Indeed, Krystal disclosed in the Amended Disclosure Statement its contention that the Dealer Agreements were assets of the estate, even though the Pennsylvania Vehicle Board had ruled in 1994 that GM properly terminated them. There is no reason why Krystal could not have asserted the § 362(h) claim in its Amended Statement.

Accordingly, the Third Circuit's decision sought to be reviewed (that Krystal was barred by judicial estoppel from asserting the § 362(h) claim) is a correct application of judicial estoppel to these facts, and in no sense can it be held to have "so far departed from the accepted or usual course of judicial proceedings . . . as to call for an exercise of [the] Court's supervisory power. . . ." (Supreme Court Rule 10(a).)

III. Krystal's procedural due process rights were not violated merely because the Court decided an issue on briefs and argument without an evidentiary hearing.

Krystal's contention that its procedural due process rights were violated because the judicial estoppel doctrine was applied without an evidentiary hearing but on the basis of briefs and argument is posited without any supporting authority. Incredibly, it is contrary to Krystal's position in the Bankruptcy Court (App. 64a) where it urged in a brief it filed that the issue was "ripe and proper for consideration" and "that it be treated and disposed of at this time." (*Supplemental Brief of Plaintiff in Opposition to Rule 12(b)(6) Motion of Defendants at 2, August 15, 2000.*) Krystal was afforded the opportunity to fully brief and argue its position. Krystal does not, because it cannot, explain how an evidentiary hearing would have altered the court's decision. Where, as here, the undisputed record reveals the

debtor's failure to disclose a putative cause of action in its Disclosure Statement despite knowledge of it, and there is no room for a trier of fact to find otherwise, there is no necessity for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JON G. HOGUE
Counsel of Record
TIMOTHY MURRAY
MURRAY, HOGUE & LANNIS
3400 Gulf Tower
Pittsburgh, PA 15219
(412) 263-5650

JAMES A. MOLLICA
Blackburn Road
Sewickley, PA 15143

Counsel for Respondents

Of Counsel:

CAROL H. LESNEK-COOPER
GENERAL MOTORS CORPORATION
3031 West Grand Boulevard
Detroit, MI 48232